

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

JANUARY TERM, 1910

No. 2099.

692

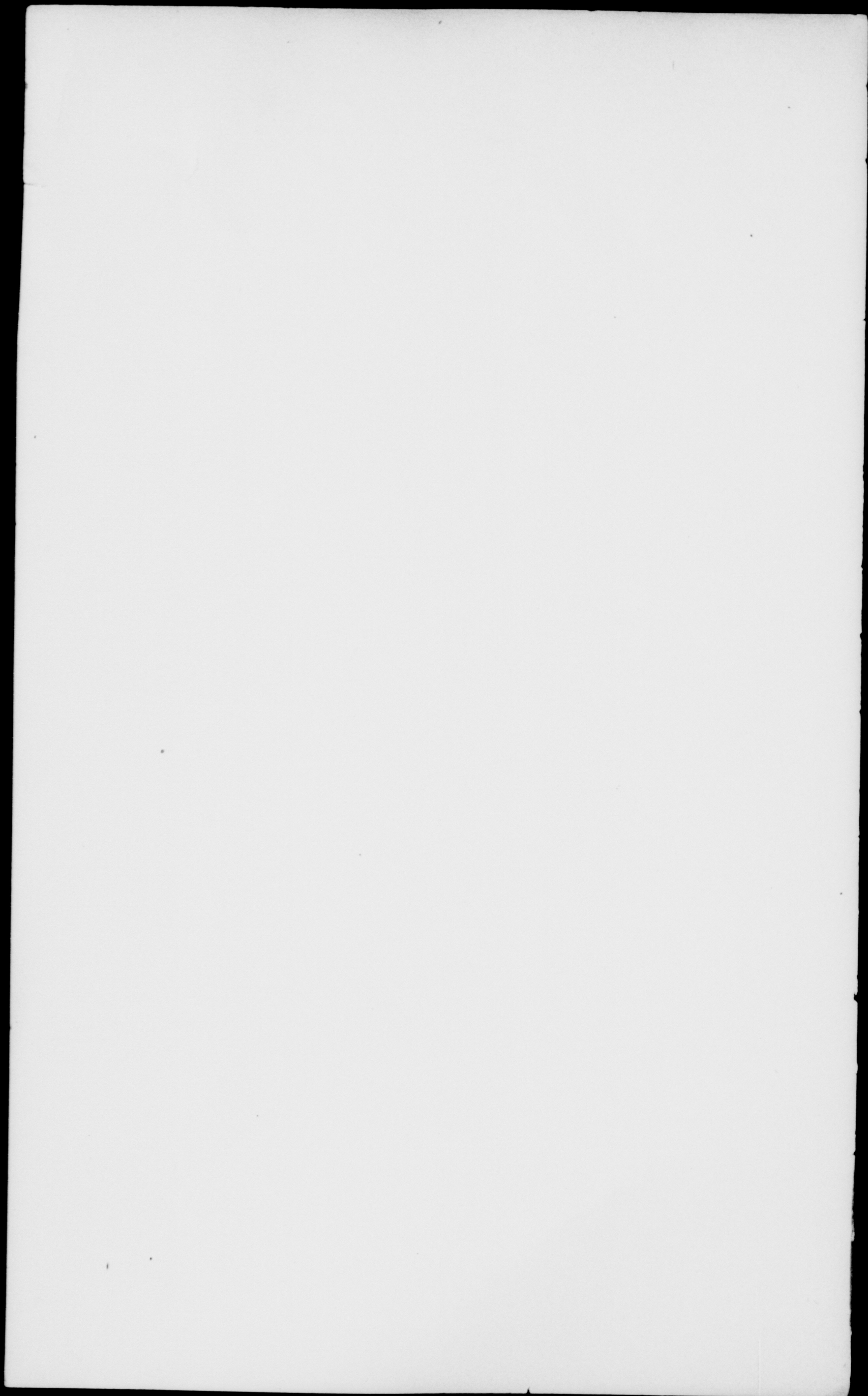
No. 6, SPECIAL CALENDAR.

THE UNITED STATES *EX RELATIONE* CORNELIA E.
LAWS, APPELLANT.

James L. Davenport vs.
~~VESPASIAN WARNER~~, COMMISSIONER OF PENSIONS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED DECEMBER 23, 1909.



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

JANUARY TERM, 1910.

No. 2099.

No. 6, SPECIAL CALENDAR.

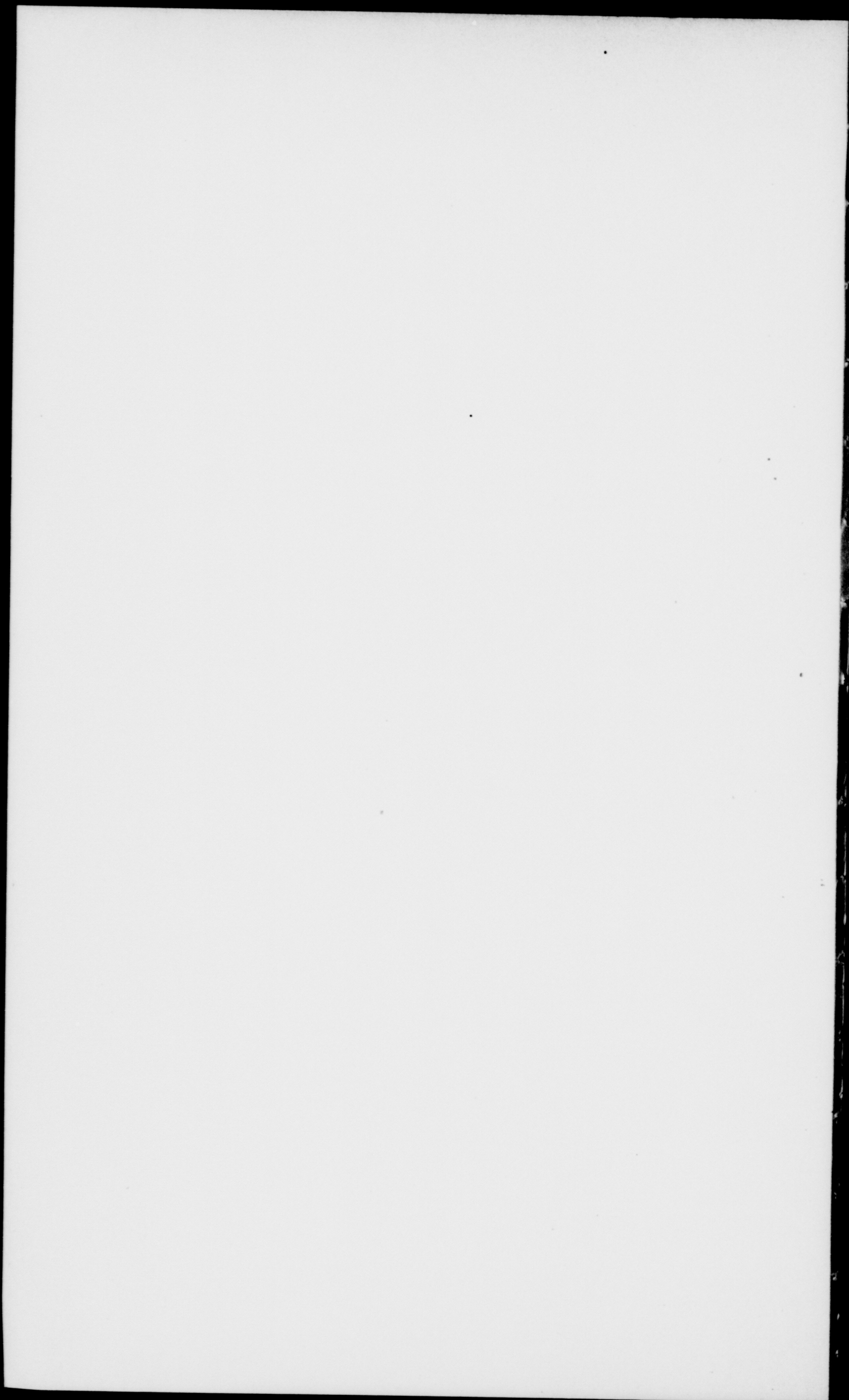
THE UNITED STATES *EX RELATIONE* CORNELIA E.
LAWS

James L. Bavenport vs.
~~VESPASIAN WARNER~~, COMMISSIONER OF PENSIONS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

	Original.	Print.
Caption	<i>a</i>	1
Petition	1	1
Answer of respondent.....	5	4
Demurrer to answer of respondent.....	17	11
Demurrer sustained; prayers of petition granted.....	18	11
Peremptory writ of mandamus ordered to issue; judgment; appeal.	19	12
Motion to set aside judgment granted; leave to respondent to amend answer	19	12
Amended answer of respondent.....	20	12
Demurrer to amended answer.....	35	21
Demurrer to amended answer overruled	36	21
Leave granted petitioner to traverse amended answer.....	37	22
Traverse.....	37	22
Motion to strike out.....	38	23
Motion to dismiss	40	24
Motion to strike out traverse granted.....	41	24
Motion to dismiss petition granted; rule to show cause discharged; petition dismissed; judgment.....	42	25
Appeal noted by petitioner	42	25
Memorandum: Appeal bond approved and filed	42	25
Directions to clerk for preparation of transcript of record.....	43	25
Clerk's certificate	45	26



In the Court of Appeals of the District of Columbia.

No. 2099.

THE UNITED STATES ex Relatione CORNELIA E. LAWS, Appellant,
vs.
VESPASIAN WARNER, Commissioner of Pensions.

a Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS
vs.
VESPASIAN WARNER, Commissioner of Pensions.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition.*

Filed May 5, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES, ex Relatione, CORNELIA E. LAWS,
vs.
VESPASIAN WARNER, Commissioner of Pensions.

To the Supreme Court of the District of Columbia:

The petition of Cornelia E. Laws respectfully represents:

1. That she is a citizen of the United States and a resident of the District of Columbia.

2. That she was formerly the widow of Jerry Gordon who died in the City of Washington, District of Columbia on the 29th day of June, 1885.

3. That she remained the widow of the said Jerry Gordon until the 19th day of June, 1895, when she re-married.

4. That at the second battle of Bull Run, August 30, 1862, while in the service of the United States and in the line of his duty as a teamster, the said Jerry Gordon was struck by a shell and so injured as to necessitate the amputation of both legs.

5. That on account of these injuries the Congress of the United States, by special act, approved July 15, 1870, granted to him, to continue during his natural life, an invalid pension of
2 twenty-five dollars per month, on account of which there was issued to him pension certificate No. 105,318, upon which the United States pension agent at Washington, D. C., paid to him to date from the passage of the said special act, the sum of twenty-five dollars per month until June 6, 1874, when the said pension was increased by operation of a general law approved at that date, to Fifty Dollars per month, which rate was paid to him quarterly on an increase certificate and so continued to be paid to him until June 17, 1878, when, by operation of a second general law approved at that date, his pension was increased to Seventy-two Dollars per month under an increase certificate, and upon which he was paid quarterly the sum of Seventy-two Dollars per month, by the above mentioned agent, until the 31st day of May, 1881, when the Commissioner of Pensions, by reason of the authority vested in him by part of section No. 4720, Revised Statutes of the United States, which reads as follows: "The Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereon until the propriety of repealing the same can be considered by Congress," suspended payment of said pension, and requested the Congress of the United States to repeal the act granting the same, and sent the papers and proofs in the case to the Pension Committee of the House of Representatives for that purpose, and repeated the same action during the Forty-seventh and the Forty-eighth Congresses.

6. That the said Committee returned all of the said papers to the Commissioner of Pensions, having failed to take any
3 action thereon.

7. That no Committee of either house of Congress has at any time recommended such action; nor has Congress or either house thereof repealed or modified said special act; nor has it repealed the general law of June 17, 1878, although years have elapsed since said suspension, and ample opportunity has been afforded for any action deemed proper in the case.

8. That all the papers in the case are in the custody of the respondent.

9. That immediately upon the death of the pensioner the accrued pension, by operation of law then and now in force (Sec. 4718 Revised Statutes of the United States and the Act of Congress approved March 2, 1895) vested in your petitioner.

10. That on the 1st day of September, 1908, she filed her application for the aforesaid accrued pension with the present Commissioner of Pensions, Vespasian Warner.

11. That on October 20, 1908, the said Commissioner of Pensions refused to adjudicate the claim upon the ground that it is a duplicate of one filed April 24, 1886, and rejected December 3, 1894, upon the ground of no title, pension being suspended at Soldier's death, and two appeals thereon being dismissed June 30, 1896, and July 29, 1898, respectively, upon the ground that the Secretary has no appellate jurisdiction in such cases.

12. That on the 8th day of December, 1908, your petitioner appealed from the action of the Commissioner to the Secretary of the Interior, who, on the 21st day of January, 1909, on the
4 ground that the Secretary has no appellate or supervisory authority as to suspension of payment of pension under special act, returned all the papers to the Commissioner of Pensions.

Wherefore your petitioner being without any other remedy either at law or in equity, prays as follows:

1. That this Court will issue the writ of mandamus, commanding the respondent, Vespasian Warner, Commissioner of Pensions, to pay to petitioner as widow of the said Jerry Gordon, the money due on the aforesaid certificate.

her
CORNELIA E. x LAWS.
mark

Witness:

H. BINGHAM.

LEMUEL FUGITT,
Att'y for Petitioner.

DISTRICT OF COLUMBIA, ss:

I, Cornelia E. Laws, do solemnly swear that I have heard read the petition by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

her
CORNELIA E. x LAWS.
mark

Witness:

H. BINGHAM.

Subscribed and sworn to before me this 5th day of May, 1909.

J. R. YOUNG, *Clerk*,
By H. BINGHAM,
Ass't Clerk.

Filed May 20, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES OF AMERICA ex Relatione CORNELIA E. LAWS
v.
VESPASIAN WARNER, Commissioner of Pensions.

This respondent, now and at all times hereafter saving and reserving unto himself all benefit and exception to the imperfections, uncertainties and defects of the said petition, and saving to himself the benefit of the lack of jurisdiction appearing on the face of said petition, either in this Court to grant the relief prayed therein or in the relator to seek it or in the respondent to grant it, and the benefit of the lack of status of the relator to pray the relief therein asked, and the benefit of the lack of jurisdiction in this Court to review, modify or annul the action of the Commissioner of Pensions, taken within his jurisdiction in the decision of a matter within his control, relying thereon the same as if a demurrer had been specifically interposed for answer unto the said petition, or so much as is material, says:

Paragraph 1.

The respondent does not deny the averment of paragraph one.

Paragraph 2.

The respondent does not deny the averment of paragraph two; that Jerry Gordon died in the City of Washington, in the District of Columbia, on the twenty-ninth day of June, eighteen hundred and eighty-five, or that the relator was the widow of Jerry Gordon.

Paragraph 3.

The respondent does not deny or admit the allegation of the third paragraph; that the relator, as the widow of Jerry Gordon, remarried on June, nineteenth, eighteen hundred and ninety-five.

Paragraph 4.

The respondent denies the averment of the fourth paragraph; that Jerry Gordon, while in the service of the United States and in the line of his duty as a teamster, at the second battle of Bull Run, on the thirtieth day of August, eighteen hundred and sixty-two, was struck by a shell and so injured as to necessitate the amputation of both legs, and states that, on the contrary, he verily believes from the evidence in his custody that the said Jerry Gordon was not so injured at said battle, or at any other time or place,

while in the discharge of his duty as a teamster in the employ of the United States, and prays that if said averment be deemed material that strict proof of the truth thereof be required.

Paragraph 5.

The respondent admits the averment of the fifth paragraph, that on the fifteenth day of July, eighteen hundred and seventy,
7 a special act of Congress, Private No. 118, entitled

"An Act granting a pension to Jerry Gordon" was approved, which said act reads as follows:

(Private—No. 118.)

An Act Granting a Pension to Jerry Gordon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Jerry Gordon, and to pay him a pension of twenty-five dollars per month from the date of this act, for and during the continuance of his natural life, said Gordon having lost both legs by reason of wounds received while in the service of the United States as a teamster at the second battle of Bull Run, Virginia.

Approved, July 15, 1870.

and the respondent admits that under the provisions of said special act pension certificate No. 105318 was issued to the said Jerry Gordon, granting to him a pension for the loss of both legs at the rate of twenty-five dollars per month from the date of the approval of said act; and that thereafter, under the provisions of the act of June sixth, eighteen hundred and seventy-four, said pension was increased to fifty dollars per month from the date of the approval of said act; and was further increased to seventy-two dollars per month from June seventeenth, eighteen hundred and seventy-eight, under the provisions of an act of Congress approved on said last-mentioned date; and the respondent admits that the said Jerry Gordon was thereafter paid quarter yearly instalments of said pension, at the rate of seventy-two dollars per month up to and including the third
8 day of December, eighteen hundred and eighty, and admits that on the ninth day of February, eighteen hundred and eighty-one—and not the thirty-first day of May, eighteen hundred and eighty-one—as alleged in the petition, the then Commissioner of Pensions, by virtue of the authority vested in him by section 4720, Revised Statutes of the United States, providing that

* * * * *

"The Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereupon until the propriety of repealing the same can be considered by Congress,"

did suspend payment to said Jerry Gordon upon evidence deemed competent to the said Commissioner of Pensions to prove that the said special act granting a pension to Jerry Gordon for

“loss of both legs by reason of wounds received while in the service of the United States as a teamster at the second battle of Bull Run, Virginia,”

was obtained by fraud, in that no such wounds were received or incurred by said Jerry Gordon while in the service of the United States at the second battle of Bull Run, as falsely alleged in the petition of said Jerry Gordon to Congress for a pension, or at any other time, nor were such wounds incurred while in the service of the United States at any other time or place, and, on the contrary, the amputation of the legs of said Jerry Gordon was done at a hospital in the City of Washington, in the District of Columbia, and was necessitated by gangrene and not by any wound or injury incurred in the line of duty as a teamster while in the service of the Government of the United States; and the respondent admits

9 that his predecessor, the then Commissioner of Pensions, as required by, and in strict accordance with the duty imposed upon him by said section 4720, Revised Statutes, after suspending payment of said pension, transmitted the entire record in the case to Congress with the recommendation that said special act, granting a pension to Jerry Gordon, be repealed, and for the advice of the Honorable Court in the premises, the respondent states that the action of his predecessor in thus suspending payment of the pension of Jerry Gordon was approved by the then Secretary of the Interior on the ninth day of April, eighteen hundred and eighty-three.

Paragraph 6.

The respondent admits the averment of the sixth paragraph that Congress returned the said papers to the Commissioner of Pensions, having failed to take action thereon.

Paragraph 7.

The respondent admits the averment of the seventh paragraph that Congress did not repeal or modify said special act, and did not repeal the general law of June seventeenth, eighteen hundred and seventy-eight.

Paragraph 8.

The respondent admits the averment of the eighth paragraph that all of the papers in the case are in the custody of the respondent.

Paragraph 9.

10 The respondent denies the averment of the ninth paragraph that immediately upon the death of the pensioner, said Jerry Gordon, that the relator by action of the provisions of section 4718 Revised Statutes of the United States, and of the act of Congress approved on March second, eighteen hundred and ninety-

five (28 S. L., 964), became entitled to the accrued pension, and states that, on the contrary, Jerry Gordon died on the twenty-ninth day of June, eighteen hundred and eighty-five, prior to the approval of the said act of Congress of March second, eighteen hundred and ninety-five, and did not, at any time, file an application for restoration of pension, and was not, on the date of his death, either a pensioner or a person entitled to a pension, having an application therefor pending within the purview of said section 4718, Revised Statutes, or of said act of March second, eighteen hundred and ninety-five, and hence no accrued pension was, or is, due to the said relator.

Paragraph 10.

The respondent admits that on the first day of September, nineteen hundred and eight, the relator filed in the Bureau of Pensions an application for the accrued pension alleged to be due Jerry Gordon on the date of his death, and to the end that the Honorable Court may be fully advised in the premises, states that said application was, and is, in substance, effect and purpose a duplicate of a similar application of the relator which was filed in the Bureau of Pensions on the twenty-first day of April, eighteen hundred and eighty-six, and which was rejected on the ground that

"as *soldier* was shown not to be entitled to pension, there could be no title to accrued pension on account of his death,"

11 and of similar applications filed on the ninth day of July, eighteen hundred and ninety-one; the twenty-eighth day of August, eighteen hundred and ninety-four; and on the nineteenth day of August, eighteen hundred and ninety-seven; and that the acts of the various Commissioners of Pensions in declining to admit the said applications of the relator for the accrued pension alleged to be due, were reaffirmed and appeals therefrom to the Department of the Interior were dismissed on May, twenty-fifth, eighteen hundred and ninety-five, under Docket No. 22857; June, thirtieth, eighteen hundred and ninety-six, Docket No. 29005; and July, twenty-ninth, eighteen hundred and ninety-eight, Docket No. 37516; and that in dismissing the last of said appeals, Docket No. 37516, Webster Davis, the Assistant Secretary of the Interior, held and determined that:

"In suspending the payment of pension under section 4720, Revised Statutes, and in continuing such suspension after he has reported the same to Congress, the Commissioner of Pensions performs an interlocutory act in obedience to the mandate contained in said section. In such event the Secretary of the Interior has no power to vacate such suspension, Congress having, by the terms of said section, expressly reserved such power to itself.

"When the mandate referred to has been fulfilled, the Secretary of the Interior has no jurisdiction."

Paragraph 11.

The respondent admits the averment of the eleventh paragraph, that on the twentieth day of October, nineteen hundred and eight,

he declined to admit the application for accrued pension filed on the first day of September, nineteen hundred and eight; and for the advice of the Honorable Court in the premises, the respondent here inserts a copy of his said action, referred to in said paragraph:

12 "A. & N. Div.
I. Ctf. 105318,
With Widow Orig.
482998,
Cornelia E. Laws,
Formerly Widow of
Jerry Gordon,
Q. M. Dept., U. S. Vols.
Accrued Pension.

OCT. 20, 1908.

Mr. Lemuel Figitt, Washington, D. C.

SIR: Referring to the application for accrued pension above described, filed by you, in behalf of the claimant, on September 1, 1908, I have to advise you that said declaration warrants no action, as it is a duplicate of a claim filed April 24, 1886, and rejected December 3, 1894, on the ground of no title, as the payment of soldier's pension was suspended at the date of his death.

It is proper to state that several appeals have been filed from this action, but in each instance the Honorable Secretary of the Interior has affirmed the action of this Bureau, holding that, "The Commissioner (of Penisons), in compliance with the mandate contained in section 4720, Revised Statutes, has issued his stay in the payment of this pension (the soldier's); when this was done, the matter was transferred, by operation of law, beyond the jurisdiction of this Department. Congress alone, by virtue of its own enactment has now the power to make the stay absolute, or to vacate it, but it must continue without modification until that body can take direct action thereon either pro or con. The Department cannot assume the power that Congress has expressly reserved to itself."

There is nothing now pending in the claim over which this Bureau has jurisdiction.

Very respectfully,

Commissioner."

and in further answer to the averment with reference to the dismissal of certain appeals filed in behalf of the relator by the Department of the Interior, respectfully invites the attention of the Honorable Court to the reference to said actions in response to paragraph 10 of this answer, and the respondent respectfully represents to the Hon-
13 orable Court that the said action on the twentieth day of October, nineteen hundred and eight, was taken in strict accordance with the instructions and decisions of the Department of the Interior with reference to the issue originally raised in the case of Jerry Gordon, and that as a subordinate of the Secretary of the Interior, the respondent is without the power or authority to set aside the action of his superior officer, said Secretary of the Interior, in the premises.

Paragraph 12.

The respondent admits the averment of the twelfth paragraph that the relator appealed from the action of the respondent to the Secretary of the Interior, and that on the twenty-first day of January, nineteen hundred and nine, Jesse E. Wilson, Assistant Secretary of the Interior, in disposing of said appeal, Docket No. 126909, held and determined as follows:

"The present being a mere duplicate of a former claim, rejection of which was before the Department in two prior appeals, adjudication of the present claim was properly refused.

"The Secretary has no appellate or supervisory authority as to suspension of payment of pension under a special act,"

and thereupon returned all the papers to the respondent, but denies the implication of the averment of said paragraph that in so holding and deciding the said Jesse E. Wilson held that it was not within the power and jurisdiction of the Secretary of the Interior to supervise and direct the acts of his subordinate, the Commissioner of Pensions, in the conduct of the business of said Bureau, but that, in fact,
 14 it was held in said decision of the twenty-first day of January, nineteen hundred and nine, that

"When payment of pension is suspended under section 4720, Revised Statutes, by reason of fraud, the Secretary of the Interior has no appellate jurisdiction, Congress having, by its own enactment, reserved such power to itself;"

that is to say, that when a Commissioner of Pensions has, in the proper exercise of the duty imposed upon him by said section 4720, Revised Statutes, suspended payment of a pension granted by a special act of Congress, it is not within his power, or of any of his successors, or of the Secretary of the Interior, to set aside such action, it being, by the terms of the law, solely within the power of the Congress of the United States to determine whether such suspension shall stand or shall be cancelled, and that until, or unless, the Congress of the United States shall remove such suspension, no further payment can be made under the special act involved.

Further Response.

The respondent respectfully represents to the Honorable Court that there is a material concealment of fact in the petition of the relator, in that no mention is therein made of the fact that on the eighteenth day of February, eighteen hundred and ninety-six, the relator filed in the Supreme Court of the District of Columbia, an action entitled *United States ex Relatione Cornelia E. Laws v. The Commissioner of Pensions and the Secretary of the Interior*, at law No. 39424, the same being a petition for mandamus to compel the
 15 payment of pension alleged to have been due to Jerry Gordon for the period from the thirty-first day of May, eighteen hundred and eighty-one, to the twenty-ninth day of June, eighteen hundred and eighty-five, and that said action was discon-

tinued upon the motion of the relator on the twenty-third day of September, eighteen hundred and ninety-six.

The respondent also respectfully represents to the Honorable Court that the petition of the relator by its terms purports to show that the object of the filing of the petition is to cause to be set aside the action of the respondent of the twentieth day of October, nineteen hundred and eight, hereinbefore mentioned under paragraph eleven, when in truth and in fact, the object sought to be accomplished by this action is to compel the Commissioner of Pensions to set aside an action taken by his predecessor on the ninth day of February, eighteen hundred and eighty-one, and that it is now too late to ask that such a mandamus be issued, even if it should be held that it is within the province of the Judicial and not within that of the Legislative branch of the Government to determine whether the suspension then ordered by the Commissioner of Pensions shall stand, and the respondent respectfully represents to the Honorable Court that the relator has been guilty of great laches in the premises.

The respondent respectfully represents to the Honorable Court that the act of his said predecessor of the ninth day of February, eighteen hundred and eighty-one, was taken in the proper exercise of a discretionary duty, imposed by law on the Commissioner of Pensions as such, and was in no sense the mere exercise of a ministerial duty; and the respondent respectfully represents to the

16 Honorable Court that, as shown in the petition of the relator, the final action taken in this case was by the Department of the Interior, and not by the Bureau of Pensions, or by the respondent as the head of such Bureau, and hence that these proceedings have been brought against the wrong officer.

The respondent further represents to the Honorable Court that if the mandamus prayed for in the petition should be issued, the effect of such mandamus would not be to enforce a legal right, but to continue a fraud upon the Government of the United States, and the respondent respectfully represents that any action of the predecessors of the respondent, the action of the respondent, and the various actions of the Secretary of the Interior hereinbefore mentioned were taken within their lawful jurisdictions, and that the law does not confer upon any person the power or jurisdiction to set aside said actions, it being solely within the province of the Congress of the United States to determine whether the suspension shall be removed.

And having fully answered, the respondent prays that the rule be discharged, the writ denied, and the petition dismissed.

J. L. DAVENPORT,
Acting Commissioner of Pensions.

DANIEL W. BAKER,
U. S. Att'y.

STUART McNAMARA,
Spec. Ass't to Att'y Gen'l.

James L. Davenport being duly sworn, says that he is the First Deputy Commissioner of Pensions of the United States, and in the absence of Vespasian Warner, Commissioner of Pensions, from the City of Washington, is the present Acting Commissioner of Pensions and because thereof he makes this answer; that he has read the foregoing answer to the rule issued herein to show cause why the writ of mandamus should not be allowed and that he knows the contents thereof; and that the matters and facts herein stated from his personal knowledge he knows to be true and those stated upon information and belief he believes to be true.

JAMES L. DAVENPORT.

Sworn to and subscribed before me this 19th day of May, nineteen hundred and nine.

[SEAL.]

C. C. STOUFFER,
Notary Public in and for the District of Columbia.

Demurrer.

Filed May 25, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS
vs.
VESPACIAN WARNER, Commissioner of Pensions.

Now comes the petitioner and says that the respondent's answer in the above entitled cause is bad in substance.

LEMUEL FUGITT,
Attorney for Petitioner.

Among the points to be argued are the following:
The duties of the Commissioner of Pensions under section 4720 Revised Statutes of the United States; and
The rights of widows of deceased pensioners to accrued pension under section 4718 Revised Statutes of the United States and the Act of Congress approved March 2, 1895.

Supreme Court of the District of Columbia.

FRIDAY, June 4, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * *

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS, Petitioner,
vs.

VESPACIAN WARNER, Commissioner of Pensions, Respondent.

This cause comes on to be heard upon the petition, rule to show cause, answer of Respondent, and demurrer of Petitioner thereto, and after argument of counsel for the respective parties, was submitted to the Court; whereupon upon consideration thereof, it is adjudged and ordered by the Court that said demurrer be, and it is hereby sustained; that the prayers of said petition be, and the same are hereby granted, and it is further ordered that a per-
19 emptory Writ of Mandamus forthwith issue against Vespasian Warner, Commissioner of Pensions, as prayed for in said petition, and that the Relator recover against the Respondent, his costs to be taxed by the Clerk, and have execution thereof.

From the foregoing the Respondent notes an appeal in open Court to the Court of Appeals of the District of Columbia.

FRIDAY, *June 25, 1909.*

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS, Petitioner,
vs.

VESPACIAN WARNER, Commissioner of Pensions, Respondent.

Now comes here the Respondent in open Court, by his Attorney Mr. Stuart McNamara, and moves the Court to set aside the judgment entered in this cause on June 4, 1909, and for leave to amend his answer, which motion is granted, and said judgment is hereby vacated and set aside, and leave granted the Respondent to amend his answer within ten (10) days from this date.

20

Amended Answer.

Filed June 29, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES OF AMERICA ex Relatione CORNELIA E. LAWS
vs.

VESPASIAN WARNER, Commissioner of Pensions.

This respondent, now and at all times hereafter saving and reserving unto himself all benefit and exception to the imperfections, uncertainties and defects of the said petition, and saving to himself

the benefit of the lack of jurisdiction appearing on the face of said petition, either in this Court to grant the relief prayed therein or in the relator to seek it or in the respondent to grant it, and the benefit of the lack of status of the relator to pray the relief therein asked, and the benefit of the lack of jurisdiction in this Court to review, modify or annul the action of the Commissioner of Pensions, taken within his jurisdiction in the decision of a matter within his control, relying thereon the same as if a demurrer had been specifically interposed for answer unto the said petition, or so much as is material, says:

Paragraph 1.

The respondent does not deny the averment of paragraph one.

21

Paragraph 2.

The respondent does not deny the averment of paragraph two: that Jerry Gordon died in the City of Washington, in the District of Columbia, on the twenty-ninth day of June, eighteen hundred and eighty-five, or that the relator was the widow of Jerry Gordon.

Paragraph 3.

The respondent does not deny or admit the allegation of the third paragraph, that the relator, as the widow of Jerry Gordon, remarried on June nineteenth, eighteen hundred and ninety-five.

Paragraph 4.

The respondent denies the averment of the fourth paragraph; that Jerry Gordon, while in the service of the United States and in the line of his duty as a teamster, at the second battle of Bull Run, on the thirtieth day of August, eighteen hundred and sixty-two, was struck by a shell and so injured as to necessitate the amputation of both legs, and states that, on the contrary, he verily believes from the evidence in his custody that the said Jerry Gordon was not so injured at said battle, or at any other time or place, while in the discharge of his duty as a teamster in the employ of the United States, and prays that if said averment be deemed material that strict proof of the truth thereof be required.

Paragraph 5.

22 The respondent admits the averment of the fifth paragraph, that on the fifteenth day of July, eighteen hundred and seventy, a special act of Congress, Private No. 118, entitled

"An Act granting a pension to Jerry Gordon" was approved, which said act reads as follows:

(Private—No. 118.)

An Act Granting a Pension to Jerry Gordon.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, authorized and directed to place

on the pension roll, subject to the provisions and limitations of the pension laws, the name of Jerry Gordon, and to pay him a pension of twenty-five dollars per month from the date of this act, for and during the continuance of his natural life, said Gordon having lost both legs by reason of wounds received while in the service of the United States as a teamster at the second battle of Bull Run, Virginia.

Approved, July 15, 1870.

and the respondent admits that under the provisions of said special act pension certificate No. 105318 was issued to the said Jerry Gordon, granting to him a pension for the loss of both legs at the rate of twenty-five dollars per month from the date of the approval of said act; and that thereafter, under the provisions of the act of June sixth, eighteen hundred and seventy-four, said pension was increased to fifty dollars per month from the date of the approval of said act; and was further increased to seventy-two dollars per month from June seventeenth, eighteen hundred and seventy-eight, under the provisions of an act of Congress approved on said last-mentioned date; and the respondent admits that the said Jerry Gordon was thereafter paid quarter yearly installments of said pension, at the rate of seventy-two dollars per month up to and including the third day of December, eighteen hundred and eighty, and admits
 23 that on the ninth day of February, eighteen hundred and eighty-one—and not the thirty-first day of May, eighteen hundred and eighty-one—as alleged in the petition, the then Commissioner of Pensions, by virtue of the authority vested in him by section 4720, Revised Statutes of the United States providing that
 * * * * *

“The Commissioner of Pensions, shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereupon until the propriety of repealing the same can be considered by Congress.”

did suspend payment to said Jerry Gordon upon evidence deemed competent to the said Commissioner of Pensions to prove that the said special act granting a pension to Jerry Gordon for

“loss of both legs by reason of wounds received while in the service of the United States as a teamster at the second battle of Bull Run, Virginia,”

was obtained by fraud, in that no such wounds were received or incurred by said Jerry Gordon while in the service of the United States at the second battle of Bull Run, as falsely alleged in the petition of said Jerry Gordon to Congress for a pension, or at any other time, nor were such wounds incurred while in the service of the United States at any other time or place, and, on the contrary, the amputation of the legs of said Jerry Gordon was done at a hospital in the City of Washington, in the District of Columbia, and was necessitated by gangrene and not by any wound or injury incurred in the line of duty as a teamster while in the service of the Government of the United States; and the respondent admits that his predecessor,

24 the then Commissioner of Pensions, as required by, and in strict accordance with the duty imposed upon him by said section 4720, Revised Statutes, after suspending payment of said pension, transmitted the entire record in the case to Congress with the recommendation that said special act, granting a pension to Jerry Gordon, be repealed, and for the advice of the Honorable Court in the premises, the respondent states that the action of his predecessor in thus suspending payment of the pension of Jerry Gordon was approved by the then Secretary of the Interior on the ninth day of April, eighteen hundred and eighty-three.

With respect to the further averments of paragraph five, that the Commissioner of Pensions repeated the act of transmitting the papers to Congress during the Forty-seventh and Forty-eighth Congress, respondent says that the same is untrue as pleaded, and he denies the same.

The fact and truth is, respondent says, that on February ninth, eighteen hundred and eighty-one, the Commissioner of Pensions recommended to Congress the repeal of the special act granting pension to Jerry Gordon, and transmitted the papers in the case with such recommendation to Congress. On February twenty-eighth, eighteen hundred and eighty-three, the Secretary of the Interior procured the return of the said papers from Congress in order to consider the same in connection with the appeal filed in behalf of Jerry Gordon by his attorney, pending before the Secretary of the Interior. On April ninth, eighteen hundred and eighty-three, the Secretary of the Interior forwarded the papers to the Commissioner of Pensions, approving his action in suspending said pension; and on some date thereafter which cannot now be determined, by

25 reason of the long lapse of time and the impairment of the records, the case appears to have been returned to Congress. On November twenty-fourth, eighteen hundred and eighty-four, Jerry Gordon filed a petition in the Court of Claims, No. 14503, and the papers were sent to the Court of Claims to be considered in connection with this case. On April twentieth, eighteen hundred and ninety-one, the suit of Jerry Gordon in the Court of Claims was dismissed for lack of jurisdiction; and on December twenty-seventh, eighteen hundred and ninety-two, the Clerk of the Court of Claims sent the papers in the case of Jerry Gordon to the Secretary of the Interior, and from him the papers were forwarded to the Commissioner of Pensions, were they still are. When the Commissioner of Pensions received the papers from the Court of Claims, Jerry Gordon was dead, and further recommendation for the repeal of the special act was deemed unnecessary for that reason.

Your respondent submits that if it be claimed by the averments of the said fifth paragraph that the said papers were transmitted to Congress during the Forty-sixth Congress and were again transmitted during the Forty-seventh and Forty-eighth Congresses, and if the said averments be material, your respondent denies the same and requires strict proof thereof.

Paragraph 6.

Respondent denies the averments of the sixth paragraph of the petition in so far as it be contended or claimed that Congress received from the Commissioner of Pensions the papers during three
26 Congresses as claimed in the fifth paragraph of said petition, and that Congress on three separate occasions returned the papers to the said Commissioner of Pensions.

It is admitted that Congress returned the papers on the occasions when it received the same, as explained by the answer of your respondent to the fifth paragraph of said petition.

Paragraph 7.

The respondent admits the averment of the seventh paragraph that Congress did not repeal or modify said special act, and did not repeal the general law of June seventeenth, eighteen hundred and seventy-eight.

Paragraph 8.

Th respondent admits the averment of the eighth paragraph that all of the papers in the case are in the custody of the respondent.

Paragraph 9.

The respondent denies the averment of the ninth paragraph that immediately upon the death of the pensioner, said Jerry Gordon, that the relator by action of the provisions of section 4718 Revised Statutes of the United States, and of the act of Congress approved on March second, eighteen hundred and ninety-five (28 S. L., 964), became entitled to the accrued pension, and states that, on the contrary, Jerry Gordon died on the twenty-ninth day of June, eighteen hundred and eighty-five, prior to the approval of the said act of Congress of March second, eighteen hundred and ninety-five, and
27 did not, at any time, file an application for restoration of pension, and was not, on the date of his death, either a pensioner or a person entitled to a pension, having an application therefor pending within the purview of said section 4718, Revised Statutes, or of said act of March second eighteen hundred and ninety-five, and hence no accrued pension was, or is, due to the said relator.

Paragraph 10.

The respondent admits that on the first day of September, nineteen hundred and eight, the relator filed in the Bureau of Pensions an application for the accrued pension alleged to be due Jerry Gordon on the date of his death, and to the end that the Honorable Court may be fully advised in the premises, states that said application was, and is, in substance, effect and purpose a duplicate of a similar application of the relator which was filed in the Bureau of Pensions on the twenty-first day of April, eighteen hundred and eighty-six, and which was rejected on the ground that

“as soldier was shown not to be entitled to pension, there could be no title to accrued pension on account of his death,”

and of similar applications filed on the ninth day of July, eighteen hundred and ninety-one; the twenty-eighth day of August, eighteen hundred and ninety-four; and on the nineteenth day of August, eighteen hundred and ninety-seven; and that the acts of the various Commissioners of Pensions in declining to admit the said applications of the relator for the accrued pension alleged to be due, were reaffirmed and appeals therefrom to the Department of the Interior were dismissed on May twenty-fifth, eighteen hundred and ninety-five, under Docket No. 22857; June thirtieth, eighteen hundred and ninety-six, Docket No. 29005; and July twenty-ninth, eighteen hundred and ninety-eight, Docket No. 37516; and that in dismissing the last of said appeals, Docket No. 37516, Webster Davis, the Assistant Secretary of the Interior, held and determined that:

"In suspending the payment of pension under section 4720, Revised Statutes, and in continuing such suspension after he had reported the same to Congress, the Commissioner of Pensions performs an interlocutory act in obedience to the mandate contained in said section. In such event the Secretary of the Interior has no power to vacate such suspension, Congress having, by the terms of said section, expressly reserved such power to itself.

"When the mandate referred to has been fulfilled, the Secretary of the Interior has no jurisdiction."

Paragraph 11.

The respondent admits the averment of the eleventh paragraph, that on the twentieth day of October, nineteen hundred and eight, he declined to admit the application for accrued pension filed on the first day of September, nineteen hundred and eight; and for the advice of the Honorable Court in the premises, the respondent here inserts a copy of his said action, referred to in said paragraph:

"A. & N. Div.
I. Ctf. 105318,
With Widow Orig.
482998,
Cornelia E. Laws,
Formerly Widow of
Jerry Gordon,
Q. M. Dept., U. S. Vols.
Accrued Pension.

Oct. 20, 1908.

Mr. Lemuel Figitt, Washington, D. C.

SIR: Referring to the application for accrued pension above described, filed by you, in behalf of the claimant, on September 1, 1908, I have to advise you that said declaration warrants no action, as it is a duplicate of a claim filed April 24, 1886, and rejected December 3, 1894, on the ground of no title, as the payment of soldier's pension was suspended at the date of his death. It is proper to state that several appeals have been filed from this action, but in each instance the Honorable Secretary of the Interior

has affirmed the action of this Bureau, holding that "The Commissioner (of Pensions), in compliance with the mandate contained in section 4720, Revised Statutes, has issued his stay in the payment of this pension (the soldier's); when this was done, the matter was transferred, by operation of law, beyond the jurisdiction of this Department Congress alone, by virtue of its own enactment has now the power to make the stay absolute, or to vacate it, but it must continue without modification until that body can take direct action thereon either pro or con. The Department cannot assume the power that Congress has expressly reserved to itself."

There is nothing now pending in the claim over which this Bureau has jurisdiction.

Very respectfully,

_____,
Commissioner."

and in further answer to the averment with reference to the dismissal of certain appeals filed in behalf of the relator by the Department of the Interior, respectfully invites the attention of the Honorable Court to the reference to said actions in response to paragraph 10 of this answer, and the respondent respectfully represents to the Honorable Court that the said action on the twentieth day of October, nineteen hundred and eight, was taken in strict accordance with the instructions and decisions of the Department of the Interior with reference to the issue originally raised in the case of Jerry Gordon, and that as a subordinate of the Secretary of the Interior, the respondent is without the power or authority to set aside the action of his superior officer, said Secretary of the Interior, in the premises.

30

Paragraph 12.

The respondent admits the averment of the twelfth paragraph that the relator appealed from the action of the respondent to the Secretary of the Interior, and that on the twenty-first day of January, nineteen hundred and nine, Jesse E. Wilson, Assistant Secretary of the Interior, in disposing of said appeal, Docket No. 126909, held and determined as follows:

"The present being a mere duplicate of a former claim, rejection of which was before the Department in two prior appeals, adjudication of the present claim was properly refused.

"The Secretary has no appellate or supervisory authority as to suspension of payment of pension under a special act,"

and thereupon returned all the papers to the respondent, but denies the implication of the averment of said paragraph that in so holding and deciding the said Jesse E. Wilson held that it was not within the power and jurisdiction of the Secretary of the Interior to supervise and direct the acts of his subordinate, the Commissioner of Pensions, in the conduct of the business of said Bureau, but that, in fact, it was held in said decision of the twenty-first day of January, nineteen hundred and nine, that

"When payment of pension is suspended under section 4720, Revised Statutes, by reason of fraud, the Secretary of the Interior

has no appellate jurisdiction, Congress having, by its own enactment, reserved such power to itself;"

that is to say, that when a Commissioner of Pensions has, in the proper exercise of the duty imposed upon him by said section 4720, Revised Statutes, suspended payment of a pension granted by a special act of Congress, it is not within his power, or of any
 31 of his successors, or of the Secretary of the Interior, to set aside such action, it being, by the terms of the law, solely within the power of the Congress of the United States to determine whether such suspension shall stand or shall be cancelled, and that until, or unless, the Congress of the United States shall remove such suspension, no further payment can be made under the special act involved.

Further Response.

The respondent respectfully represents to the Honorable Court that there is a material concealment of fact in the petition of the relator, in that no mention is therein made of the fact that on the eighteenth day of February, eighteen hundred and ninety-six, the relator filed in the Supreme Court of the District of Columbia, an action entitled

At Law. No. 39424.

UNITED STATES ex Relatione CORNELIA E. LAWS

v.

THE COMMISSIONER OF PENSIONS and THE SECRETARY OF THE INTERIOR,

the same being a petition for mandamus to compel the payment of pension alleged to have been due to Jerry Gordon, for the period from the thirty-first day of May, eighteen hundred and eighty-one, to the twenty-ninth day of June, eighteen hundred and eighty-five, and that said action was discontinued upon the motion of the relator on the twenty-third day of September, eighteen hundred and ninety-six.

The respondent also respectfully represents to the Honorable Court that the petition of the relator by its terms purports to show that the
 32 object of the filing of the petition is to cause to be set aside the action of the respondent of the twentieth day of October, nineteen hundred and eight, hereinbefore mentioned under paragraph eleven, when in truth and in fact, the object sought to be accomplished by this action is to compel the Commissioner of Pensions to set aside an action taken by his predecessor on the ninth day of February, eighteen hundred and eighty-one, and that it is now too late to ask that such a mandamus be issued, even if it should be held that it is within the province of the judicial and not within that of the legislative branch of the Government to determine whether the suspension then ordered by the Commissioner of Pensions shall stand, and the respondent respectfully represents to the Honorable Court that the relator has been guilty of great laches in the premises.

And your respondent further represents that the Commissioner of Pensions is not now in possession of the records and the evidence which he had in eighteen hundred and eighty-one, when he suspended payment of the said pension, and which he had on February eighteenth, eighteen hundred and ninety-six, when the relator filed in the Supreme Court of the District of Columbia a petition for mandamus, seeking the same relief as in the case at bar, but which petition was dismissed voluntarily on the motion of the said relator. In the long lapse of time, the Commissioner of Pensions has lost much of the evidence material to his defense of the case. Letterpress books containing correspondence and records material and necessary to his defense of this case have passed out of existence, and certain employees of the Pension Bureau who took part in the various actions had in this case have since died or have retired

33 from the Bureau and are no longer available to the respondent for his defense. And your respondent represents that by reason of such gross laches the Commissioner of Pensions has been injured and prejudiced in his ability to now defend the action which he took twenty-eight years ago and which was made the basis of the suit identical with the case at bar by relator thirteen years ago, and which at that time the Commissioner of Pensions could properly answer and defend. And your respondent respectfully represents that he is not now in a position to defend this action as he was able to defend it in eighteen hundred and ninety-six, or prior thereto, and by reason of the extreme laches of relator he has suffered material and substantial injury, and he therefore submits to the Court that the relator is barred by her own laches from suing out the writ of mandamus.

The respondent respectfully represents to the Honorable Court that the act of his said predecessor of the ninth day of February, eighteen hundred and eighty-one, was taken in the proper exercise of a discretionary duty, imposed by law on the Commissioner of Pensions as such, and was in no sense the mere exercise of a ministerial duty; and the respondent respectfully represents to the Honorable Court that, as shown in the petition of the relator, the final action taken in this case was by the Department of the Interior, and not by the Bureau of Pensions, or by the respondent as the head of such Bureau, and hence that these proceedings have been brought against the wrong officer.

The respondent further represents to the Honorable Court that if the mandamus prayed for in the petition should be issued,

34 the effect of such mandamus would not be to enforce a legal right, but to continue a fraud upon the Government of the United States, and the respondent respectfully represents that any action of the predecessors of the respondent, the action of the respondent, and the various actions of the Secretary of the Interior hereinbefore mentioned were taken within their lawful jurisdictions, and that the law does not confer upon any person the power of jurisdiction to set aside such actions, it being solely within the province of the Congress of the United States to determine whether the suspension shall be removed.

And having fully answered, the respondent prays that the rule be discharged, the writ denied, and the petition dismissed.

VESPASIAN WARNER,
Commissioner of Pensions.

DANIEL W. BAKER, *U. S. Att'y.*

Vespasian Warner, being duly sworn, says that he is Commissioner of Pensions of the United States; that he has read the foregoing answer to the rule issued herein to show cause why the writ of mandamus should not be allowed and that he knows the contents thereof, and that the matters and facts herein stated from his personal knowledge he knows to be true and those stated upon information and belief he believes to be true.

VESPASIAN WARNER.

35 Sworn to and subscribed before me this 29th day of June
nineteen hundred and nine.
[SEAL.]

F. E. KEITH,
*Notary Public in and for the
District of Columbia.*

Demurrer to Amended Answer.

Filed July 19, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES OF AMERICA ex Relatione CORNELIA E. LAWS
vs.
VESPACIAN WARNER, Commissioner of Pensions.

Now comes the petitioner and says the respondent's amended answer in the above entitled cause is bad in substance.

LEMUEL FUGITT,
Attorney for Petitioner.

Among the questions of law to be argued are the powers and duties of the Commissioner of Pensions under section 4720 Revised Statutes of the United States, and the rights of widows of deceased pensioners under section 4718 Revised Statutes of the United States and the Act of Congress approved March 2, 1895.

36 Supreme Court of the District of Columbia.

FRIDAY, October 15, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 51612.

THE UNITED STATES ex Rel. CORNELIA LAWS, Petitioner,
vs.
VESPASIAN WARNER, Commissioner of Pensions, Respondent.

Upon consideration of the petitioner's demurrer to the respondent's amended answer, it is ordered that said demurrer be, and the same is hereby overruled.

THURSDAY, *October 21*, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS, Petitioner,
vs.
VESPACIAN WARNER, Commissioner of Pensions, Respondent.

37 Upon motion of the petitioner by her Attorney Mr. Lemuel Fugitt, in open Court, leave is hereby granted to said petitioner to traverse the amended answer of the respondent in this cause in ten (10) days from this date.

Traverse.

Filed October 28, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

THE UNITED STATES OF AMERICA ex Relatione CORNELIA E. LAWS
vs.
VESPASIAN WARNER, Commissioner of Pensions.

Relator Cornelia E. Laws, denies that she has been guilty of any laches herein or any laches in the prosecution of her claim to the accrued pension due her deceased husband Jerry Gordon.

Relator Cornelia E. Laws says that her petition for mandamus filed in this court in May 1896 was dismissed by her without any process having issued therein of any kind directed to any person or persons.

In petition of relator filed herein there is no "material concealment" or other concealment of any facts that have any legal, equitable or other bearing upon this case or the issues raised by the pleadings herein and there is not any concealment of any facts of any kind.

By reason of anything said or done by relator Cornelia E. Laws, or by reason of anything left unsaid or undone by her in relation

38 to this case or her prosecution of her claim for accrued pension due her late husband Jerry Gordon the defendant has not been and cannot be prejudiced or damaged, and of this she puts herself upon the country.

LEMUEL FUGITT,
Attorney for Relator.

Motion to Strike Out.

Filed November 3, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

UNITED STATES OF AMERICA ex Rel. CORNELIA E. LAWS

vs.

VESPASIAN WARNER, Commissioner of Pensions.

Now comes the defendant and moves the Court to strike out the paper filed herein by the plaintiff, termed a traverse to the amended answer of the defendant, upon the grounds, amongst others, as follows:

1. That the said pleading is an improper reply to the amended answer of defendant.

2. That the said pleading is not a traverse or a demurrer or a proper pleading to said amended answer.

3. That said pleading raises no issue of law or in fact in mandamus proceedings.

4. That the said pleading attempts to deny laches on the part of the plaintiff in the prosecution of her claim, while in truth the said pleading sets out no new facts, nor does it deny in the proper
39 manner of pleading the facts set out in the amended answer filed herein, but merely alleges conclusions of law.

5. That the allegation as to the plaintiff's dismissing her prior suit for mandamus filed in May, 1906, is immaterial.

6. That the said pleading is improper and irregular and is not a proper traverse to the amended answer of the defendant.

7. And for other grounds apparent upon the face of the said paper and the records in these proceedings.

DANIEL W. BAKER,
Attorney for Defendant.

Lemuel Fugitt, Esquire, Colorado Building, Washington, D. C.,
Attorney for Plaintiff:

Please take notice that the above motion will be called to the attention of the Justice holding Circuit Court No. 1 on Friday, November 12, 1909, at 10 o'clock A. M., or so soon thereafter as counsel can be heard.

DANIEL W. BAKER,
Per REGINALD S. HUIDEKOPER,
Attorneys for Defendant.

Motion to Dismiss.

Filed November 3, 1909.

In the Supreme Court of the District of Columbia.

At Law. No. 51612.

UNITED STATES OF AMERICA ex Rel. CORNELIA E. LAWS
 vs.
 VESPASIAN WARNER, Commissioner of Pensions.

Now comes the defendant and moves the Court as follows:

1. To dismiss the petition for the writ of mandamus filed herein on the 5th day of May, A. D. 1909.

2. For judgment on the order entered herein on the 15th day of October, A. D. 1909, overruling the demurrer of the plaintiff to the amended answer of the defendant filed herein.

3. That the paper filed herein by plaintiff assuming to be a traverse to the amended answer of the defendant be disregarded and held for naught as being an improper traverse to said amended answer in a mandamus proceeding.

DANIEL W. BAKER,
Attorney for Defendant.

Lemuel Fugitt, Esquire, Colorado Bld., Washington, D. C., Attorney for Plaintiff:

Please take notice that the above motion will be called to the attention of the Justice holding Circuit Court No. 1 on Friday November 12, 1909, at 10 o'clock A. M., or so soon thereafter as counsel can be heard.

DANIEL W. BAKER,
 REGINALD S. HUIDEKOPER,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

FRIDAY, November 12, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS, Petitioner,
 vs.
 VESPASIAN WARNER, Commissioner of Pensions, Respondent.

Upon consideration of the Respondent's motion filed herein to strike out the paper filed herein by the Petitioner "termed a traverse

to the amended answer of the defendant", it is ordered that said motion be, and it is hereby granted.

Further it appearing to the Court that the Petitioner's demurrer to the Respondent's amended answer was overruled on the 15th day of October, 1909, it is ordered that the Respondent's motion filed herein to dismiss the petition in this cause be, and it is
42 hereby granted.

Wherefore it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition dismissed, and that the Respondent recover against the Petitioner the costs of his defense, to be taxed by the Clerk, and have execution thereof.

MONDAY, November 15, 1909.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

At Law. No. 51612.

THE UNITED STATES ex Relatione CORNELIA E. LAWS, Petitioner,
vs.
VESPACIAN WARNER, Commissioner of Pensions, Respondent.

Now comes here the Petitioner by her Attorney Mr. Lemuel Fugitt in open Court, and notes an appeal to the Court of Appeals of the District of Columbia in this cause, and upon motion, the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars (\$100).

Memorandum.

NOVEMBER 17, 1909.

Appeal bond approved and filed.

43 *Directions to Clerk for Preparation of Transcript of Record.*

Filed November 19, 1909.

In the Supreme Court of the District of Columbia, the 19 Day of November, 1909.

At Law. No. 51612.

THE UNITED STATES OF AMERICA ex Relatione CORNELIA E. LAWS
vs.
VESPACIAN WARNER, Commissioner of Pensions.

The Clerk of the said Court will please transmit to the Court of Appeals the following record in the above entitled case:

Petition filed May 5, 1909;

Answer filed May 20, 1909;

Demurrer to Answer filed May 25, 1909;

Order sustaining Demurrer and the Writ of Mandamus to issue;
Appeal noted; June 4, 1909;

Order of June 4, 1909, vacated with leave to amend answer in
10 days, June 25, 1909;

Amended Answer filed June 29, 1909;

Demurrer to Amended Answer filed July 19, 1909;

Order overruling Demurrer to Amended Answer, Oct. 15, 1909;

Leave to file traverse to amended answer in 10 days, Oct. 21,
1909;

Traverse to Amended Answer filed Oct. 28, 1909;

44 Motion to strike out traverse filed Nov. 3, 1909;

Motion to dismiss petition filed Nov. 3, 1909;

Order dismissing petition &c. Nov. 12, 1909;

Appeal noted and penalty of bond, Nov. 12, 1909;

Memo.: Appeal bond filed Nov. 17, 1909;

Designation.

LEMUEL FUGITT,
Atty. for Petitioner.

45 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

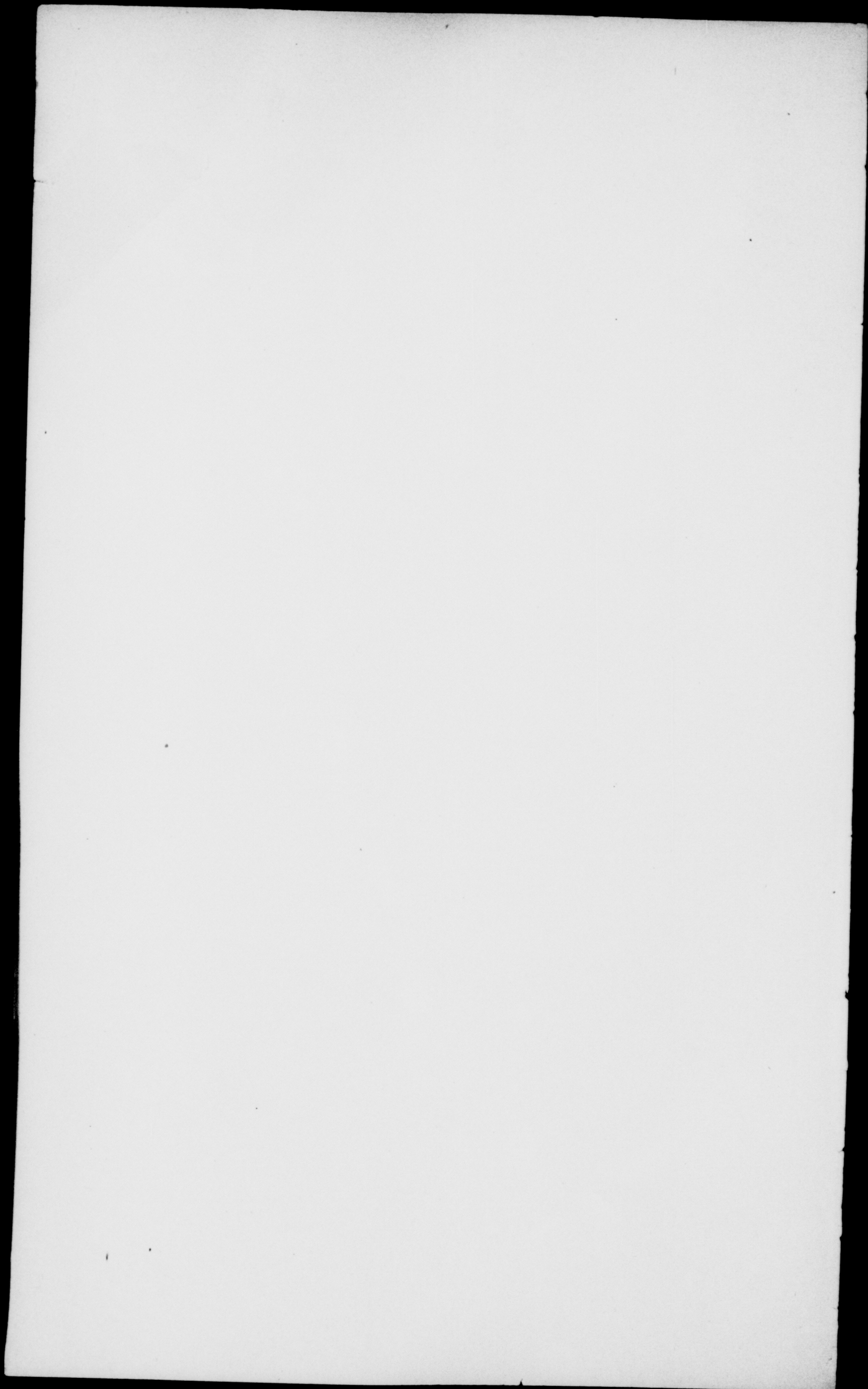
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51612 at Law, wherein The United States, ex relatione Cornelia E. Laws is Petitioner and Vespasian Warner, Commissioner of Pensions is Respondent, as the same hemains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of December, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2099. The United States ex relatione Cornelia E. Laws, appellant, vs. Vespasian Warner, Commissioner of Pensions. Court of Appeals, District of Columbia. Filed Dec. 23, 1909. Henry W. Hodges, clerk.



COURT OF APPEALS
DISTRICT OF COLUMBIA

FILED

JAN 21 1910

Henry W. Hodgson
IN THE *to wit.*

Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 6, SPECIAL CALENDAR.

THE UNITED STATES, *ex relatione*,
CORNELIA E. LAWS, *Appellant*,

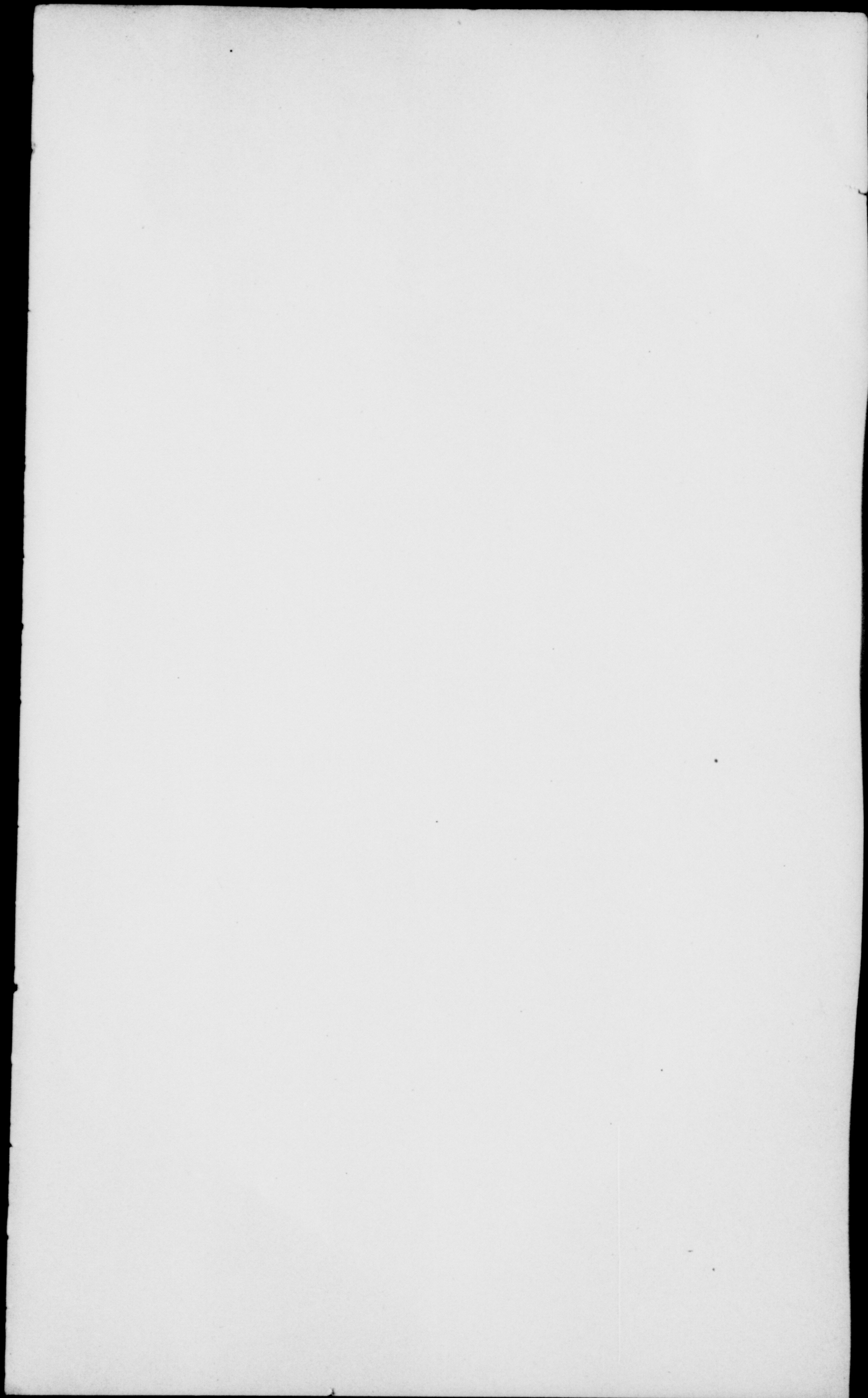
vs.

VESPACIAN WARNER, *Commis-*
sioner of Pensions.

} No. 2099.

BRIEF FOR APPELLANT.

LEMUEL FUGITT,
Attorney for Appellant.



IN THE
Court of Appeals, District of Columbia

JANUARY TERM, 1910.

No. 6, SPECIAL CALENDAR.

THE UNITED STATES, <i>ex relatione</i> ,	}	No. 2099.
CORNELIA E. LAWS, <i>Appellant</i> ,		
<i>vs.</i>		
VESPACIAN WARNER, <i>Commis-</i>		
<i>sioner of Pensions.</i>		

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

On the 15th day of July, 1870, the Congress of the United States passed an act directing the Secretary of the Interior to place the name of Jerry Gordon upon the pension roll and thereafter to pay him a pension during his natural life. (Record, pp. 13 and 14.)

In compliance with the requirements of the said act the name of Jerry Gordon was placed on the pension roll and certificate No. 105,318 was issued to him, upon which the Commissioner of Pensions, as a ministerial officer, paid him his pension from the passage of the said act up to and including the third day of December, 1880. (Rec., p. 14.)

On the ninth day of February, 1881, the Commissioner of Pensions by virtue of the authority vested in him by Section 4720, Revised Statutes of the United States, providing that "The Commissioner of Pensions shall upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend the payment thereupon until the propriety of repealing the same can be considered by Congress," suspended payment of the said pension (Rec., p. 14), and then sent the entire record to Congress, with a recommendation that the said special act granting a pension to Jerry Gordon be repealed (Rec., p. 15).

These papers remained with Congress from the ninth day of February, 1881, until the 28th day of February, 1883, when the Secretary of the Interior procured their return in order to consider them in connection with an appeal filed in behalf of Jerry Gordon, and which was then pending before the Secretary of the Interior (Rec., p. 15).

On April 9, 1883, the Secretary of the Interior forwarded the papers to the Commissioner of Pensions who, subsequently, returned them to Congress (Rec., p. 15).

After the said return, during the 48th Congress, Mr. Budd introduced in the House of Representatives bill numbered 5717, for the repeal of the special act granting a pension to Jerry Gordon, which bill was read twice and referred to the Committee on Invalid Pensions, which bill was never returned to the House of Representatives (Congressional Record, 48th Congress, p. 1753). On the 24th day of November, 1884, Jerry Gordon filed a petition in the Court of Claims, No. 14,503, to recover the pension money then due him (Rec., p. 15, and Court of Claims Report, Vol. 26 p. 307, *et seq.*).

On November 18, 1890, the death of Jerry Gordon was suggested, and leave asked that the suit progress in the name of his widow, which was allowed (Court of Claims Report, Vol. 26, p. 307, *et seq.*)

On April 20, 1891, the Court, in dismissing the petition, said:

"This case from its allegations seems to be very meritorious in point of service; but the claimant must seek that department of the Government that has the power to grant the relief sought. Holding, as we do, that under the law defining the general powers of the Court, we have no jurisdiction of the claim made in the petition, the case is dismissed." (Court of Claims Report, Vol. 26, p. 307, *et seq.*, and Rec., p. 15.)

The relator, as the widow of the said Jerry Gordon, made application to the Commissioner of Pensions for the pension due Jerry Gordon at the time of his death, as follows: April 26, 1886; July 9, 1891; August 28, 1894; August 19, 1897, and September 1, 1908, all of which applications were rejected by the Commissioner of Pensions and, on appeal to the Secretary of the Interior, were affirmed by that officer (Rec., par. 10, pp. 16 and 17).

On the 18th day of February, 1896, the relator filed in the Supreme Court of the District of Columbia, an action, entitled: At Law, No. 39,424, United States, *ex relatione*, Cornelia E. Laws vs. The Commissioner of Pensions and The Secretary of the Interior, the same being a petition for mandamus to compel the payment of pension due to Jerry Gordon for the period from the 31st day of May, 1881, to the 29th day of June, 1885, which action she discontinued upon her own motion on the 23d day of September, 1896 (Rec., p. 19).

That on the 1st day of September, 1908, relator again applied to the Commissioner of Pensions for the pension money due Jerry Gordon at the time of his death (Rec., par. 10, p. 2), which application was disallowed on the 20th day of October, 1908 (Rec., p. 3, par. 11).

That on the 8th day of December, 1908, relator appealed from the action of the Commissioner to the Secretary of the Interior, who, on the 21st day of January, 1909, on the ground that the Secretary has no appellate or supervisory authority as to suspension of payment of pension under special act, dismissed the appeal (Rec., p. 3).

On the 5th day of May, 1909, the relator filed in the Supreme Court of the District of Columbia an action at law entitled: At Law, No. 51,612, The United States, *ex relatione*, Cornelia E. Laws vs. Vespasian Warner, Commissioner of Pensions. (Rec., p. 1.)

That on the 20th day of May, 1909, the respondent filed his answer (Rec., p. 4).

That on the 25th day of May the relator filed a demurrer to the respondent's answer (Rec., p. 11).

On the 4th day of June, 1909, upon the hearing by the Court of the petition, rule to show cause, answer of respondent, demurrer thereto, and argument of counsel for the respective parties, the demurrer was sustained and the writ of mandamus ordered to issue (Rec., p. 12).

From the foregoing the respondent noted an appeal in open Court to the Court of Appeals of the District of Columbia (Rec., p. 12), which appeal is still pending.

On the 25th day of June, 1909, on motion of the respondent, in open Court, by his attorney, the judgment in this cause was vacated, and ten days granted to the respondent in which to amend his answer (Rec., p. 12).

On the 29th of June, 1909, the respondent filed his amended answer (Rec., p. 12).

On the 19th day of July, 1909, the relator filed a demurrer to the amended answer (Rec., p. 21), which demurrer, upon consideration by the Court, was, October 15, 1909, overruled (Rec., pp. 21 and 22).

On October 21, 1909, upon motion of petitioner by her attorney, in open court, leave was granted to said petitioner

to traverse the amended answer of respondent in ten days (Rec., p. 22).

On October 28, 1909, traverse to the amended answer of the respondent was filed (Rec., p. 22).

On November 3, 1909, motion to strike the traverse herein was filed (Rec., p. 23).

On November 3, 1909, a motion was filed by the respondent by his attorney to dismiss the petition for the writ of mandamus filed herein on the 5th day of May, A. D. 1909 (Rec., p. 24).

On November 12, 1909, upon consideration by the Court, the respondent's motion to strike out the relator's traverse to respondent's amended answer and the one to dismiss relator's petition were granted and the petition dismissed.

On November 15, 1909, the petitioner by her attorney in open court noted an appeal to the Court of Appeals of the District of Columbia, and the bond for costs on said appeal was fixed in the sum of one hundred dollars.

ASSIGNMENT OF ERRORS.

1. Setting aside of judgment of June 4, 1909.
2. Overruling relator's demurrer to respondent's amended answer.
3. Striking out relator's traverse.
4. Dismissing relator's petition.

ARGUMENT.

On the 15th day of July, 1870, Congress passed an act directing the Secretary of the Interior to place the name of Jerry Gordon on the pension roll and thereafter, during his natural life to pay him a pension. In compliance with the said act Gordon's name was placed on the pension roll and the Commissioner of Pensions as a ministerial officer, paid the said pension from the passage of the said act until and including the 3d day of December, 1881. On the 9th day

of February, 1881, the Commissioner of Pensions, by virtue of the authority vested in him by Section 4720, Revised Statutes of the United States, which provides "The Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereon until the propriety of repealing the same can be considered by Congress" suspended the payment of the said pension and requested the Congress of the United States to repeal the act granting the same. These papers remained with Congress a little more than two years, during which time no action was taken in the matter by Congress, and the respondent fails in his answer to inform the court of the reason of the inaction of Congress.

The relator contends that when the Commissioner of Pensions suspended payment of this pension it was his duty after waiting a reasonable time, to resume the payment of the pension. The pensioner having waited a long time for the action of the proper authorities in the case, and none being taken evidently during the latter part of 1882, applied to the Commissioner of Pensions for the resumption of the payment of his pension, for the respondent says in his answer (Rec., p. 15) that "On February 28, 1883, the Secretary of the Interior procured the return of the said papers from Congress in order to consider the same in connection with the appeal filed in behalf of Jerry Gordon by his attorney, pending before the Secretary of the Interior," because there was no other official from whom to appeal. As the Commissioner of Pensions was unable to get Congress to act on his recommendation it is presumable that the evidence of fraud submitted by him was not sufficient to satisfy any member of Congress to whom it was submitted. In his answer he is silent on that point. Again, on the withdrawal of the papers from Congress, and long before their withdrawal, the authority of the Commissioner of Pensions was at an end and it was his duty to resume the payment of the pension of Jerry Gordon.

After the Secretary of the Interior had disposed of Gordon's appeal in 1883, the papers were returned to the Commissioner of Pensions who says (Rec., p. 15) that some date thereafter, which cannot now be determined, the papers APPEAR to have been returned to Congress. The fact is the papers were returned to Congress and Bill 5717 was introduced in the House of Representatives by Mr. Budd for the repeal of the act granting a pension to Jerry Gordon, read twice and referred to the Committee on Invalid Pensions, as appears by Congressional Record, 48th Congress, p. 1753, of which this Court will take judicial notice. This bill was never returned by the said committee. This was action and *adverse action* by Congress and the duty of the Commissioner of Pensions in trying to have the said special act repealed was for the second time at an end and it was his duty again to resume the payment of this pension. And as to this transaction the respondent is again silent. As the papers in question were returned to the Commissioner of Pensions by the Committee to whom they and the bill in question were sent, it is probable that he was fully advised of its action and the reason therefore.

The Court of Claims in dismissing Gordon's petition for lack of jurisdiction, said that that Court had at the time the petition was filed power over such claims but was deprived of it by the act of 1887. (Court of Claims Report, Vol. 26, p. 307, *et seq.*) That immediately upon the death of the pensioner, Jerry Gordon, the accrued pension, by operation of law then and now in force, Section 4718, Revised Statutes of the United States and the Act of Congress, approved March 2, 1895, vested in relator.

That as the widow of the said Jerry Gordon she has repeatedly applied to the Commissioner of Pensions and the Secretary of the Interior for the accrued pension as will appear by reference to the record. Relator's right to this money is granted by an act or acts of Congress against which no statute of limitations runs.

Both laws, Section 4718, Revised Statutes of the United States, and the Act of March 2, 1895, confer this right and provide that the right shall continue during the life of the widow. Laches is not known to the pension laws.

The Court below erred in dismissing the judgment of June 4, 1909, because the said Court was without jurisdiction in the matter and was in violation of rule XV of the Court of Appeals of the District of Columbia (District of Columbia vs. Roth, Vol. 18 D. C. Reports, p. 547, *et seq.*)

On June 4, 1909, immediately after the decision of the Supreme Court of the District of Columbia, sustaining relator's demurrer to respondent's answer and ordering the writ prayed for to issue, the attorney for the United States, in open court, noted an appeal to the Court of Appeals of the District of Columbia. As the respondent is not required to give bond, his appeal was in contemplation of law perfected. (D. C. vs. Roth, Vol. 18, p. 547 *et seq.*)

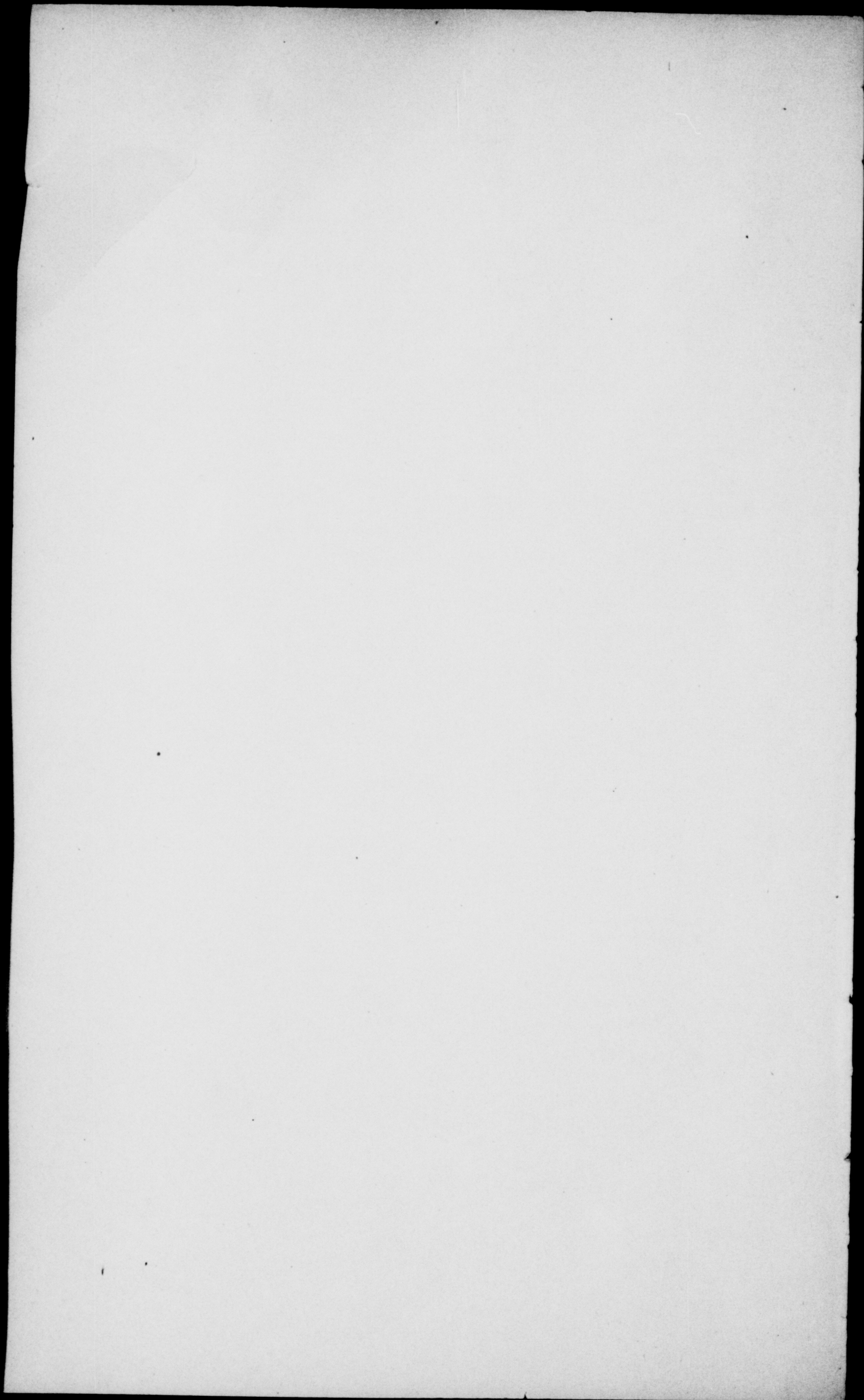
If the Court below had jurisdiction then it, in setting aside said judgment, violated Rule 61 of the said Court which provides: "The motion to vacate a judgment must be in writing, and the grounds upon which it is founded must be supported by affidavit."

When an appeal is entered in the Court below, it appears that the said lower court has no further jurisdiction over the case except that conferred upon it by the rules of the Court of Appeals of the District of Columbia. (Rule XV, Ct. of Appls.)

The Court below erred in vacating the judgment of June 4, 1909, because it was done on motion of counsel for respondent in open court, orally, and *ex parte*, and in violation of Law Rule 33 of said Court.

The Court below erred in overruling relator's demurrer and dismissing her petition. The only questions in dispute are only those of law.

LEMUEL FUGITT,
Attorney for Appellant.



JAN 29 1910

Henry W. Hodges
to file

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, A. D. 1910.

No. 2099.

UNITED STATES, EX RELATIONE CORNELIA E.
LAWS, APPELLANT,

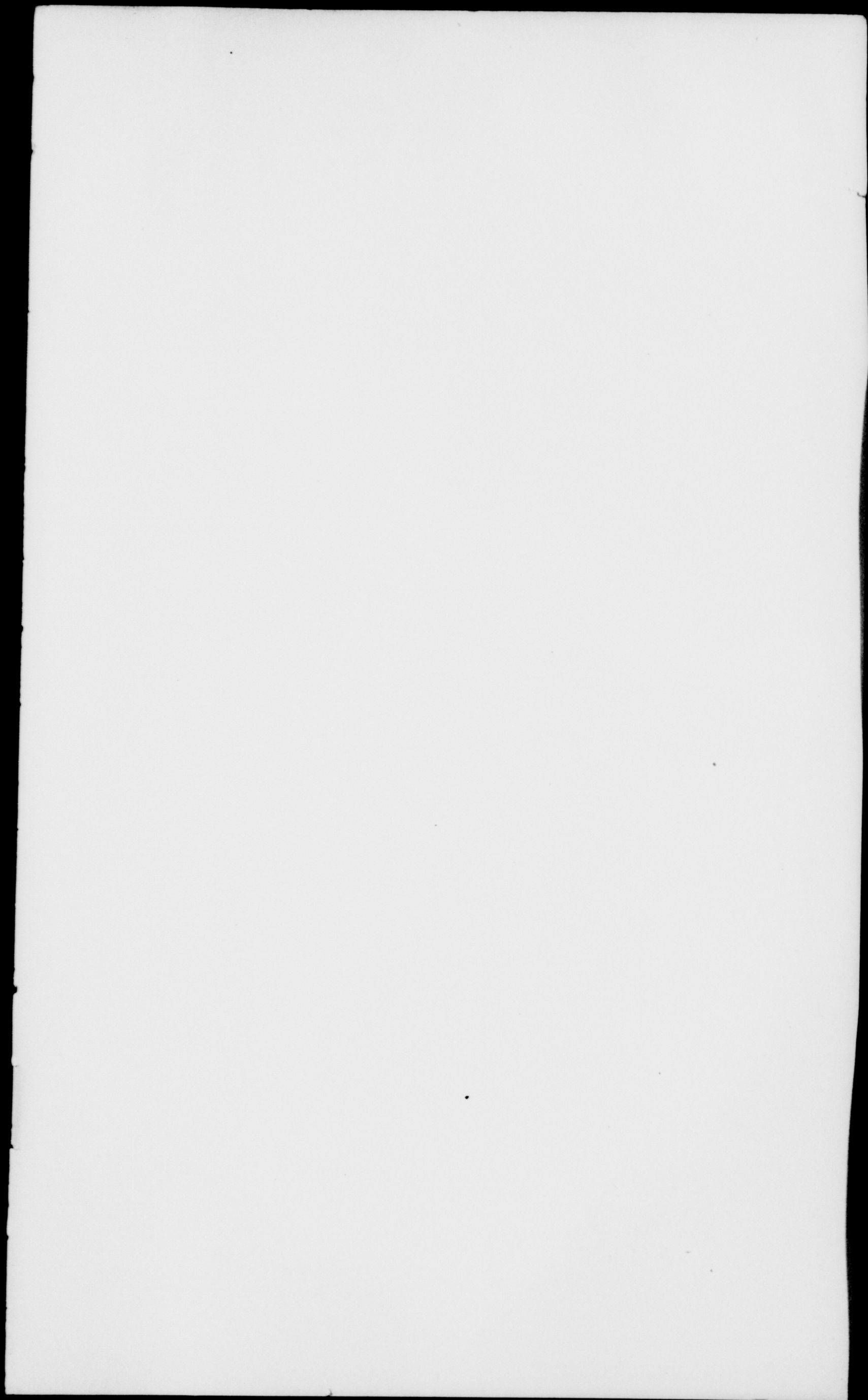
vs.

VESPASIAN WARNER, COMMISSIONER OF
PENSIONS.

BRIEF FOR APPELLEE.

DANIEL W. BAKER,
Attorney of the United States
in and for the District of Columbia.

REGINALD S. HUIDEKOPER,
F. SPRIGG PERRY,
Assistant Attorneys of the United States
in and for the District of Columbia.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

JANUARY TERM, A. D. 1910.

No. 2099.

UNITED STATES, EX RELATIONE CORNELIA E.
LAWS, APPELLANT,

vs.

VESPASIAN WARNER, COMMISSIONER OF
PENSIONS.

BRIEF FOR APPELLEE.

Statement.

In the court below a petition for a writ of mandamus was filed by the appellant, to compel the appellee to pay the petitioner, as widow of one Jerry Gordon, money claimed to be due as "accrued pension" upon a pension certificate. The appellant's demurrer to appellee's amended answer was overruled on October 15th, and thereupon the appellant filed what purported to be a traverse to the amended answer. Upon motion of the appellee, the court struck out the traverse to the amended answer, as being improper and raising no issue of law or in fact, and thereupon gave judgment upon the order overruling the appellant's demurrer to the amended answer, and dismissed the petition.

The petition for the writ of mandamus sets out that

the petitioner (now remarried) was the widow of one Jerry Gordon, who died on the 29th day of June, 1885; that Congress, by special act, approved July 15, 1870, granted Jerry Gordon an invalid pension of \$25 a month, on account of injuries received at the battle of Bull Run, on account of which there was issued to him a pension certificate; that the pension allowance was paid for several years, when, by operation of two general laws, the pension was increased finally to \$72 per month, upon which increase he was paid quarterly until May 31, 1881; that by virtue of the authority vested in him by part of section 4720 of the Revised Statutes of the United States which reads:

“The Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereon until the propriety of repealing the same can be considered by Congress,”

the Commissioner of Pensions suspended payment of said pension, and requested Congress to repeal the act granting the same, and sent papers and proofs in the case to Congress for that purpose, and repeated the same action during the 47th and 48th Congress; that Congress returned the papers and failed to take any action thereon, and that it had not repealed the general law of June 17, 1878; that on September 1, 1908, the petitioner had filed her application for the aforesaid accrued pension, but the Commissioner of Pensions, on October 20, 1908, refused to adjudicate her claim, upon the ground that it was a duplicate of one filed April 24, 1886, and upon the ground of no title, the pension being suspended at the soldier's death, and that two appeals thereon being dismissed June 30, 1896, and July 29, 1898, respectively, on the ground that the Secretary had no appellate jurisdiction, an appeal to the Secretary of the

Interior from the Commissioner's ruling was dismissed on July 21, 1909. The petitioner prays that a writ of mandamus issue commanding the respondent, Vespasian Warner, the Commissioner of Pensions, to pay the petitioner, the widow of the said Jerry Gordon, the money due on the aforesaid certificate.

The amended answer of the respondent denies that Jerry Gordon, while in the service of the United States, in his line of duty as teamster at the battle of Bull Run, was so injured as to necessitate the amputation of both legs, but states that Gordon was not so injured while in the discharge of his duty or in the employ of the United States. The amended answer admits the private act granting the pension to Gordon, and admits that under the provisions of the act a pension certificate was issued to him, and that the pension was increased on various dates and was paid to Gordon as set out in the petition. It further admits that the Commissioner of Pensions, by virtue of the authority vested in him, suspended the payment of the pension, upon evidence deemed competent by him to prove that the special act granting the pension for the loss of both legs by reason of wounds received while in the service of the United States as teamster at the second battle of Bull Run, was obtained by fraud. The answer further alleges that no such wounds were received by Gordon while in the service of the United States, as falsely alleged in the petition to Congress for pension; but that, on the contrary, the amputation of the legs of Gordon was done in a hospital in Washington, and was necessitated by gangrene, and not by any wound or injury incurred in the line of duty while in the service of the United States. The respondent admits that his predecessor, as required by law, transmitted the record to Congress, with the recommendation that the special act granting the pension to Gordon be repealed, and the act suspending payment

was approved by the Secretary of the Interior on April 9, 1883. The respondent further denies the allegations concerning the transmittal of the papers to Congress, and sets out (p. 15 of the Record) the facts concerning the papers being forwarded to the Court of Claims, etc. The respondent further denies that upon the death of Gordon, the petitioner, by virtue of the act of March 2, 1895, became entitled to the accrued pension, but states that on the contrary, that Gordon died June 29, 1885, prior to the approval of the said act, and did not at any time file an application for a restoration of the pension, and was not at the date of his death a pensioner, or entitled to a pension, and had not an application pending therefor within the purview of said act of March 2, 1895. The amended answer substantially admits the proceedings before the Department of the Interior and the Bureau of Pensions, and sets out the proceedings had thereon; it further alleges that when the Commissioner of Pensions had suspended payment of a pension, by virtue of the authority of section 4720 of the Revised Statutes, it is not within his power or that of his successors, or of the Secretary of the Interior, to set aside such action, it being solely within the power of Congress to determine whether the suspension shall stand, or be cancelled.

The amended answer further sets out that the petitioner filed a mandamus suit similar to the present one, in February, 1896, and voluntarily discontinued the same; that the object of the present proceedings is to compel the Commissioner of Pensions to set aside the action taken by his predecessor on the 9th of February, 1881, and that it is too late to ask for such relief by mandamus, as the relator had been guilty of gross laches; that the Commissioner of Pensions is not now in possession of the evidence which he had in 1881, when the pension was suspended, or in 1896, when the former

mandamus proceeding was filed; that the respondent has been injured and prejudiced by the gross laches, and he has not now the ability to defend the action which his predecessor took twenty-eight years ago, and by reason of the long delay, he submits that the relator is barred by her own laches from suing out the writ of mandamus.

The answer further sets out that the act of his predecessor of the 9th of February, 1881, was taken in the proper exercise of his discretionary duty as Commissioner of Pensions, and that the final act approving this action was taken by the Department of the Interior and not by the head of the Bureau of Pensions, and that were a mandamus to issue, it would not enforce a legal right, but continue a fraud on the Government.

To this amended answer the petitioner demurred, and upon the demurrer being overruled, filed the traverse which is set out upon page 22 of the record. The allegations of the traverse were substantially that the petitioner was not guilty of any laches; that the petition for mandamus, filed in May, 1896, was dismissed by her, without process having issued; that "there is no material concealment or any other concealment of any facts that have any legal, equitable, or other bearing upon this case."

A motion was made to strike out the paper termed a traverse alleging that the said pleading was improper, and did not raise any issue of law or in fact, and although said pleading attempts to deny laches, it sets out no new facts, but merely alleges conclusions of law. A motion was also filed to dismiss the petition, and to enter judgment on the order of October 15, 1909, overruling the demurrer to the plaintiff's amended answer. On November 12, 1909, these motions were granted and the traverse to the amended answer of the defendant

was stricken out, and the petition was dismissed based upon the order of October 15th, overruling the demurrer to the respondent's amended answer. After these proceedings an appeal was noted to this court.

I.

Traverse was Properly Stricken Out.

It is submitted that the paper filed (Rec., p. 22) by the appellant, termed a traverse was improper as a traverse to the amended answer, or as a pleading of any character, and was therefore properly stricken out by the court below.

The amended answer set out, amongst other things, facts showing, first, that the pension was procured by fraud; second, that from February 9, 1881 (when the Commissioner of Pensions suspended payment on the pension certificate and recommended to Congress a repeal of the special act granting the pension), to the filing of the present proceedings on May 5, 1909, a period of twenty-eight years had elapsed before the petitioner had applied to the court for the present writ of mandamus, and was thus guilty of gross laches. The appellant, in his traverse, did not reply at all to the allegation of fraud, which must therefore be admitted. To the allegation concerning her inactivity for twenty-eight years she merely responds that she "denies that she has been guilty of any laches herein, or any laches in the prosecution of her claim." Another allegation of the traverse, in response to facts set out in the amended answer was that "there is no material concealment." In neither case does she attempt to deny the facts alleged in the answer, but merely contents herself with these general conclusions. It is a too well established principle to require citation of authority that facts should be alleged in pleadings, and not mere conclusions of law.

As the traverse contained nothing but conclusions of law, the same was worthless, and was properly stricken out on motion.

State ex rel. Lanier vs. County Commrs., 19 Fla., 518-540.

Dennis vs. Nelson, 55 Minn., 144.

Mallinckrodt vs. Nemnick, 169 Mo., 388.

Holmes vs. Railway Co., 57 N. J. L., 502.

Calvert vs. Lowell, 10 Ark., 147.

Roberts vs. Albright, 2 Green (Iowa), 120.

31 Cyc., 49 et seq. and 641 and cases cited in notes.

The traverse attempted to deny laches by a mere general allegation that appellant was not guilty of laches. It is well settled that one who seeks to avoid laches, must plead his excuse by allegations which are full, clear, specific, positive, definite, and distinct, and no mere generalities of statements or allegations which are vague or uncertain will meet the requirement.

Beaulieu vs. Beaulieu, 23 How., 190.

Stearns vs. Page, 7 How., 819.

McQuiddy vs. Ware, 20 Wall., 19.

In *Peck vs. Haley*, 21 App. D. C., 244, this court said:

"The facts which constitute fraud or excuse for delay must be specifically stated. *Badger vs. Badger*, 2 Wall., 87, 95."

See, also, 25 Cyc., 1416, and cases cited.

In *Naddo vs. Brandon*, 51 Fed., 493-500, it is stated.

"It is a familiar rule that a party who seeks to explain laches must make a full, clear, and specific statement of all the facts upon which he relies. No generality of statement will suffice."

II.

The Order Allowing Leave to Amend the Answer was Proper.

The contention of the appellant that the court erred by its order of June 25th, in setting aside the judgment entered on the fourth day of June, 1909, and granting the appellee leave to amend his answer, is for the first time raised upon this appeal. It is well established by the following authorities that an appellate court will not consider an alleged error of the court below which was not presented to that court but is raised for the first time in the appellate court:

Montana Railway Co. *vs* Warren, 137 U. S., 348.

Lloyd *vs* Preston, 146 U. S., 630.

Wash. Gas Light Co. *vs* Poore, 3 App. D. C., 127.

Smith *vs* Olcott, 19 App. D. C., 61.

Ches. & Ohio Ry. Co. *vs* Howard, 14 App. D. C., 262.

Amer. Ice Co. *vs* Eastern Trust Co., 17 App. D. C., 422.

Price *vs* United States, 14 App. D. C., 404.

Edwards *vs* Elliott, 21 Wall., 532.

It will be noted that the order of June 25th, setting aside the decree of June 4th, was made within the same term of the court.

In the case of *Bronson vs. Schulten*, 104 U. S., 410, the court said:

“It is a general rule of law that all judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and that they may be set aside, vacated, modified or annulled by that court.”

To the same effect are:

Ex parte Lange, 18 Wall, 163.

Goddard vs. Ordway, 101 U. S., 752.

Henderson vs. Carbondale Coal Co., 140 U. S., 25.

Doss vs. Tyack, 14 How., 297-313.

Memphis vs. Brown, 94 U. S., 715.

During the term at which a judgment was rendered, the court has power on its own motion to vacate the same for irregularity, or because it was improvidently or inadvertently entered, and without notice to the parties.

Hall vs. Polack, 42 Cal., 218.

Jordan vs. Tarver, 92 Ga., 379.

Ray vs. Moore, 19 Ind. App., 690.

Wolmerstadt vs. Jacobs, 61 Iowa, 372.

Smith vs. Perkins, 124 Mo., 50.

Wyler vs. Union Pacific Railroad, 89 Fed., 41.

Ætna Life Ins. vs. Hamilton, 79 Fed., 575.

Freeman on Judgments, par. 103:

"During the term at which a judgment was rendered, the power of the court over it is so absolute that it may vacate it on its own motion, and whether on its own motion or not, without requiring notice to be given to the party to be affected by its order."

Rich vs. Thornton, 69 Ala., 473.

Desribes vs. Wilmer, 69 Ala., 25.

Lake vs. Jones, 49 Ind., 297.

In making the order of June 25th, allowing the appellee to amend his answer, the court simply followed the usual practice prevailing in the District of Columbia, in allowing the party whose pleading has been found deficient upon demurrer thereto, additional time for

leave to amend. The court might have done this upon its own motion, without notice to either of the parties to the cause, and under the authorities above cited, and there was therefore no error in the action taken.

Counsel further contends that upon noting an appeal the case was beyond the jurisdiction of the lower court, as the Commissioner of Pensions is not required to give bond.

When the attorney for the appellee moved the court to set aside the judgment of June 4th, and requested leave to amend, he thereby waived the appeal which he had noted from such former judgment, and thereby consented to have the appeal dismissed. This he had a perfect right to do. An appellant is entitled to dismiss his own appeal.

Latham vs. U. S., 9 Wall., 145.

U. S. vs. Minnesota, etc., R. Co., 18 How., 241.

Newson vs. Douglass, 7 Harr. & J., 417.

Diffenderffer vs. Hughes, 7 Harr. & J., 3.

"The appellant may at any time dismiss his appeal."

Oelberman vs. Newman, 83 Wis., 212.

International Bldg., etc., Assoc., vs. Snodgrass
(Tex. Civ. App., 1894), 26 S. W., 309.

Vandyke vs. Tenbroke, 1 N. J. L., 144.

Hancock Co. vs. Marsh, 3 Ill., 491.

Bacon vs. Lawrence, 26 Ill., 53.

Hood vs. Marshall, 69 N. H., 605.

Simpson vs. Gaffney, 66 N. H., 477.

Lawlor vs. Magnolia Metal Co., 158 N. Y., 743.

Harper vs. Albee, 10 Iowa, 389.

The appellant made no objection at the time or during the pendency of the suit in the lower court, to the order of June 25th, but filed his subsequent pleadings in the lower court, without calling the attention of that court

to any defect or irregularity in the order of June 25th. By pleading over, without making any objection to said order, the appellant has waived the defect, if any there be, in the order complained of. The following authorities hold that defects or irregularities in the proceedings to vacate a judgment, or in the action of the court thereto, are waived if the party fails to object in due season, or shows his acquiescence by participating in the further proceedings in the action:

Colart vs. Moore, 79 Ala., 361.

Donaldson vs. Copeland, 101 Ill. App., 252.

North vs. Wetmore, 87 Io., 62.

Boston, etc., Co. vs. Organ, 53 Kans., 386.

May vs. Ball, 12 La. Ann., 416.

Weston vs. Citizens Nat. Bank, 88 N. Y. App. Div., 330.

Skinner vs. Terry, 107 N. Car., 103.

III.

Fraud in Procuring the Pension.

The demurrer to the amended answer admitted all the facts therein properly pleaded. The amended answer (pp. 13 and 14 of the Record) denies the averment of the petition that Jerry Gordon, while in the service of the United States and in the line of his duty as teamster, at the second battle of Bull Run, was struck by a shell and so injured as to necessitate the amputation of both legs. The amended answer further states that the special act granting a pension to Jerry Gordon for—

“loss of both legs by reason of wounds received while in the service of the United States as a teamster at the second battle of Bull Run, Virginia, was obtained by fraud, in that no such wounds were received or incurred by said Jerry Gordon while in the service of the United States

at the second battle of Bull Run, as falsely alleged in the petition of said Jerry Gordon to Congress for a pension, or at any time, nor were such wounds incurred while in the service of the United States, or at any time or place, and, on the contrary, the amputation of the legs of the said Jerry Gordon was done at a hospital in the city of Washington, in the District of Columbia, and was necessitated by gangrene and not by any wound or injury incurred in the line of duty as a teamster while in the service of the Government of the United States."

These allegations of fraud in procuring the pension are admitted by the demurrer. With this admission on the face of the record, we have the appellant seeking the aid of mandamus to compel the appellee to pay an accrued pension for injuries which are admitted were not received. The writ of mandamus is, in certain instances, a proper remedy to correct a wrong, but never to perpetrate one. Those who seek its assistance must come into court with clean hands, and where the court sees that the issuance of the writ will aid in a palpable fraud, the writ must be denied. Mandamus will be refused where the basis of securing the act sought to be enforced shows fraud.

In this case the passing of the act of Congress granting the pension is shown to have been procured by fraud, and now the appellant seeks to continue the fraud, thus perpetrated on Congress, by requiring payment of the accrued pension money claimed to be due under the act. The writ of mandamus is subject to the sound discretion of the court, and ought not to issue in cases of doubtful right, and never to perpetrate or continue a fraud.

In *Garfield vs. U. S. ex rel. Turner*, 31 App. D. C., 332, this court held that the writ of mandamus is not a writ of right, and will issue only in the exercise of sound

discretion of the court; the relator will not be entitled to the writ if he does not come into court with clean hands or where it is sought by the proceeding to perpetuate fraud.

An order of the lower court directing that the writ of mandamus issue against the Secretary of the Interior commanding him to restore the relators to the rolls of citizenship of the Creek Nation was reversed, where the order was entered on a demurrer to the answer, and the answer on information and belief charged fraud on the part of the relators in procuring their enrolment, which enrolment was subsequently cancelled by the striking of the relator's name from the rolls. The court said:

"It is well settled that the facts alleged in the answer or returned upon information and belief are sufficient to raise disputed questions of law and fact. *U. S. ex rel. Redfield vs. Windom*, 137 U. S., 637. It follows, we think, that if such a pleading is sufficient to raise an issue of fact, a demurrer thereto must logically operate as an admission of the facts therein alleged. A demurrer to the answer in an action at law admits all new facts alleged in the answer. *Re Sanford Fork and Tool Co.*, 160 U. S., 247. By 'new facts' can be meant only such facts as are well pleaded, material to the issue, and are capable of properly presenting disputed questions of fact.

"It therefore appears that the *relators are here admitting that they fraudulently procured their names to be placed upon the rolls*, and that, upon a hearing and investigation, of which their counsel had notice, their names were stricken from the rolls by an order of respondent's predecessor made prior to March 4, 1907, the date fixed by law for the final completion of the rolls by the Secretary of the Interior. *By these admissions they have divested themselves of every vestige of right to be heard in a court of justice.* The machinery of law may always be set in motion to protect valid property rights, but here no rights exist. . . .

"The writ of mandamus is not a writ of right, and will issue only in the exercise of the sound discretion of the court. It will not issue where no right is shown to exist, nor will it issue to perpetuate a fraud. In High on Extraordinary Legal Remedies, sec. 26, it is said: 'It is important that a person seeking the aid of a mandamus for the enforcement of his rights should come into court with clean hands; and, where the proceedings have been tainted with fraud and corruption, the relief will be denied, however meritorious the application may be on other grounds.' A similar rule is announced in Spelling on Injunctions & Extraordinary Remedies, sec. 1380: 'While the remedy by mandamus is not equitable, but strictly legal, yet, by analogy to the principles prevailing in courts of equity, it is a uniform requirement that the relator, in seeking this remedy, must come into court with clean hands. If the proceedings have been tainted with fraud, or if the relator has, through his neglect, lost the benefit of a legal remedy to which he was once entitled, relief will be denied, however meritorious the proceeding may be on other grounds.' The principles above announced are supported in *People ex rel. Wood vs. Board of Assessors*, 137 N. Y., 201, 33 N. E., 145; *People ex rel. Durant Land & Improv. Co. vs. Jeroloman*, 139 N. Y., 14, 34 N. E., 726; *Com. ex rel. Vandyke vs. Henry*, 49 Pa., 530; *State ex rel. McBride vs. Phillips County*, 26 Kan., 419; and *State ex rel. McClellan vs. Graves*, 19 Md., 351, 81 Am. Dec., 639."

Commonwealth ex rel. Vandyke vs. Henry, 49 Pa. St., 530:

An ordinance of the city of Philadelphia providing that the mayor "be and he is hereby authorized to execute" leases for coal lands of the Girard estate to such persons "as may be accepted by the superintendent" under "the super-

vision of the committee of councils of that estate," it appears that certain parties had obtained the consent of the superintendent and committee of councils to a lease of coal lands, and that the ordinance was imperative in its terms upon the mayor of Philadelphia to execute the lease. It was discovered that there was bribery and fraud in procuring the lease from the council, and the court held that although the ordinance was imperative in terms upon the mayor that a mandamus to compel him to execute the lease should be refused.

The court said:

"No court will knowingly suffer itself to be the instrument to carry into execution a rotten and unsound bargain, especially where it affects an important private trust. . . . to found the application the law requires the applicant to establish a specific legal right as well as a want of specific legal remedy. . . . The title therefore of the relators to have a perfect lease depends upon the fairness of their conduct in procuring themselves to be presented as proper parties to receive it. . . . The evidence shows the proceeding to corrupt the channels through which their application must come and the corrupt proceeding by the said committee by whom it was recommended. The application therefor appears before us with such a taint as we are justified in refusing to exercise the high and extraordinary powers invoked by this writ."

Sherwood vs. Rynearson, 141 Mich., 92:

Upon demurrer to an answer, the court, in holding that the answer must be taken as true, said:

"The court, in using its discretion, will not grant the mandamus where it is the relator who is not entitled to the money represented by the order, which he seeks to have paid."

Western Union Telegraph Co. vs. State, 165 Ind., 492:

In a mandamus proceeding to compel the telegraph company to deliver the stock quotations to a "bucket shop," the court in denying the writ for mandamus, said:

"It (the writ of mandamus) is remedial process, and may be used to remedy a wrong, and not to permit one to compel the discharge of a duty which ought to be performed, and not to compel an act which will work a public or private mischief, or to compel a compliance with the strict letter of the law in disregard to its spirit, or in aid of a palpable fraud. *People vs. Board*, 137 N. Y., 201-204."

State ex rel. Hawthorne vs. U. S. Express Co., 95 Minn., 442:

"Persons securing its aid must come into court with clean hands. Where the proceedings have been tainted with fraud and corruption, the relief will be denied, however meritorious the application may be on other grounds (authorities). Mandamus will not lie to compel the doing of an act which without its command would not be lawful. . . . Nor should a court allow it to compel a technical compliance with the letter of the law, when such compliance will violate the spirit of the law."

Indiana Road Machine Co. vs. Kenney, 147 Mich., 184:

A mandamus was denied, where the proceedings sought payment on a contract obtained by the fraudulent representations of relator.

See, also:

Borough vs. Studley, 67 Conn., 170.

State vs. Marston, 6 Kans., 524.

IV.

Appellant's Remedy is Barred.

The petition for mandamus shows upon its face that the payment of the pension money sought to be ordered to be paid by these proceedings, was suspended on the 31st day of May, 1881. These proceedings were instituted on the 5th day of May, 1909, twenty-eight years thereafter.

The allegations of the amended answer, which are admitted by the demurrer, are:

That the pension was paid until December 3, 1880, and that on February 9, 1881, the Commissioner of Pensions, by virtue of the authority vested in him by section 4720 of the Revised Statutes, suspended payment on evidence deemed satisfactory to him that the pension was obtained by fraud, and on said date transmitted the papers to Congress, with his recommendation to repeal the special act granting the pension to Jerry Gordon. The papers were used by the Secretary of the Interior in 1883 in the consideration of an appeal, and on April 9, 1883, by him sent to the Commissioner of Pensions with the approval of the Commissioner's action suspending the payment of the pension, and the papers were then sent back to Congress. In 1884 Jerry Gordon filed suit in the Court of Claims, and the papers were sent there, and on dismissal of this suit the papers were returned to the Commissioner of Pensions in 1892, on which date the said Gordon was dead, and further recommendation for the repeal of the special act was deemed unnecessary.

The amended answer further shows that similar applications were made by the appellant to the Bureau of Pensions in 1886, 1891, 1894, 1897 and in 1908, for the accrued pension alleged to be due Gordon on the date of his death, all of which were denied by the various Commissioners of Pensions. The Secretary of the Interior,

on appeal, affirmed each one of these decisions, stating in his last decision (Rec., p. 18) that the matter was beyond his jurisdiction and Congress alone could act. The amended answer further shows that a mandamus proceeding similar to the present one was filed by the appellant on February 18, 1896, and discontinued by her.

The amended answer further sets out that the object sought to be accomplished by this action is to compel the Commissioner of Pensions to set aside an action taken by his predecessor on February 9, 1881, and that the relator is guilty of great laches in the premises; that the Commissioner of Pensions is not now in possession of the records and evidence which he had in 1881, or in 1896 (Rec., p. 20), and that in the long lapse of time much evidence material to his defense has been lost, and the letter press books containing correspondence and records material and necessary to his defense have passed out of existence, and that certain employees of the Pension Bureau who took part in the various actions in this case are dead or can not be found; that by reason of the long delay the appellee has been injured and prejudiced in his defense by the long delay.

From the foregoing summary of the amended answer, it will be seen that if the appellant was aggrieved of the action of the Commissioner of Pensions in suspending the payment for fraud, the right, if any, accrued in 1881, or on the death of Jerry Gordon in 1885. Instead of then applying to the court for a mandamus, she repeatedly importunes the Commissioner of Pensions and the Secretary of the Interior for the payment, just as a creditor might demand payment of his debtor who persistently, from the first, continues to refuse to pay. Can it be said by repeating his demands against a debtor, a creditor could thus suspend the running of the Statute of Limitations? The statute, in such a case, begins to run with the first demand and refusal, and after the statu-

tory period has started from such demand and refusal, and the period of limitations has run, the action thereon, if pleaded, is forever barred.

1. Statute of Limitations.

By section 1265 of the Code of the District of Columbia it is provided:

"No action shall be brought for . . . nor upon any simple contract, express or implied, . . . or for the recovery of personal property or damages for its unlawful detention, after three years from the time when the right to maintain any such action shall have accrued, . . . and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued."

The amended answer shows that twenty-eight years have elapsed since the right of action, if any there be, accrued, and twenty-four years since the full amount of of the pension money on the alleged accrued pension would have been payable if the same were in fact due. The petition prays that the appellee be commanded to pay the money alleged to be due on the pension certificate. The object of this action is therefore, as stated in the petition, to require the payment of money.

There is nothing in chapter 42 of the Code, title "Mandamus," which can be construed to exempt a mandamus proceeding from the category of any other civil action. In fact, section 1276, in regard to the pleadings, provides that after the answer, further proceedings shall be had as if the petitioner had brought an action for false return. It will be noted in this connection that in cases holding that the Statute of Limitations in the respective States did not apply to mandamus proceedings, expressions are used as to mandamus "as pleadings in civil actions," or as proceedings had "in the same

manner as in civil actions." No such expression is used in our Code; and it is believed that in States where it is decided that the Statute of Limitations did not apply to mandamus, in each instance they have some provision, which exempt mandamus proceedings, which are not contained in our Code,

Our Code provides that no "action" shall be maintained. The Supreme Court of the United States has twice decided that a mandamus proceeding is an "action," as will be seen from the following authorities, the first of which came up from the District of Columbia:

Kendall vs. U. S., 12 Pet., 524, 614:

"That the proceedings on a mandamus is a case within the meaning of the act of Congress, has been too often recognized in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right; and is prosecuted according to the forms of judicial procedure."

Commonwealth vs. Dennison, 24 How., 66, 97:

"It is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ."

In the courts of the District of Columbia, mandamus proceedings have uniformly been treated as actions at law, and the Code even provides that a jury may be summoned to try the issues raised by the pleadings. A motion for a new trial may be made, and the ancient theory that a writ of mandamus was a prerogative writ, which can be issued only by the authority and in the name of the sovereign, has long since been superseded by the present form of bringing the action by petition in the relation of the United States, but no application to the Attorney-General or to any other Government official is required to obtain leave to file the petition. In all

respects the proceedings are treated as a civil action, and as was said in the case of *Commonwealth vs Dennison, supra*, the mandamus "in modern practice is nothing more than an action at law between the parties."

It is therefore respectfully submitted that the action in mandamus, not having been filed within three years after the alleged right accrued, is barred by the Statute of Limitations in force in this District.

2. *Laches.*

There is no attempt on the part of the appellant to excuse her long delay in bringing these proceedings, nor does she give any excuse for voluntarily dismissing her petition for the writ of mandamus in 1896. The appellee shows in his amended answer that he has been greatly prejudiced by the long delay, and has lost much of the evidence material to his defense, and pleads laches as a bar to the present proceedings. Without abandoning the contention that the Statute of Limitations in this jurisdiction is a complete bar to mandamus, it is submitted that the granting of the mandamus is within the sound discretion of the court, and when it is apparent that the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, the writ will be denied.

In this case, the appellant has shown no excuse for her delay. A proceeding for mandamus being an extraordinary legal proceeding, the action must be prosecuted with diligence. Where no excuse is shown for failure to prosecute the action, the court, in the exercise of its discretion, will refuse to issue the writ of mandamus.

It is respectfully submitted that the following authorities fully support the action of the court below in dismissing the petition upon the ground of laches:

Chapman vs. County of Douglas, 107 U. S., 348, 355:

A bill in equity was filed to compel the county either to surrender certain land or to pay a reasonable price

therefor. The land had been conveyed to the county, which had given its notes secured by mortgage for the balance due on the purchase. The Supreme Court of the State, having decided that the county could not be bound to pay the purchase money at any specified time, but was limited to the payment in cash, or to levy an annual tax to create a fund wherewith to pay the residue. The notes remaining unpaid, the bill was filed in equity for the purposes above stated. The Supreme Court said:

"I have reached the conclusion that the plea of the Statute of Limitations can not be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which they can be paid, or a sufficient time has been given to do so in the mode pointed out in the statute, their payment may be demanded, and if refused, legally coerced.

"And if, in such cases, a proceeding in *mandamus* should be considered to be the more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the Statute of Limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons, though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by *mandamus* must depend, in a great measure, on the character and circumstances of the particular case. *Chinn vs. Trustees*, 32 Ohio St., 236; *Moses on Mandamus*, 190. There is no Statute of Limitations in Nebraska applicable to that proceeding."

People ex rel. Steinson vs. Board of Education, 158 N. Y., 125:

"It appears that in 1886 the relator received a certificate from the State superintendent of public instruction authorizing him to teach in any public

school within this State. Subsequently there was issued to him by the city superintendent of schools in the city of New York a provisional license to teach in the public schools of that city for a period of six months, and thereafter he was appointed to be an assistant teacher in one of the grammar schools of the city. Renewals of the license were granted to him from time to time for periods of six months until March, 1890, at which time a further renewal was refused. An appeal being taken by the relator to the State superintendent of public instruction, he obtained a decision from that officer declaring the action of the city superintendent in refusing a renewal to be unlawful. Thereupon, and in January, 1891, he applied for a peremptory writ of mandamus requiring the defendant to pay to him the amount of his salary. The application was denied and the denial was affirmed at the general term, the latter court pointing out in its opinion that mandamus was not the proper remedy, as the relator had an adequate remedy at law to recover his salary if legally entitled to it. This latter decision was made in June, 1891. An appeal was taken to the Court of Appeals, but the same was not brought on for hearing until 1896, when the order appealed from was affirmed upon the opinion of the general term. A few months later the present proceeding was begun, to secure the relator's reinstatement in his former position of teacher.

"Upon these facts, showing a delay of about six years in instituting the present proceeding, the relator was chargeable with a *laches*, which was not shown to be excusable. He had been advised in the prior proceeding as to his mistake in the remedy selected. It was incumbent upon him, if he desired to avail himself of the present remedy, to proceed without unreasonable delay and not having done so, but having persisted in prosecuting the other remedy by way of two appeals, it was quite competent for the court below, in the exercise of its discretion, to deny the application for this writ because of the delay of the relator

in applying for it. The right to a mandamus was not at all clear; but, even assuming that a case was made out in which a peremptory writ might have been issued, the court had a discretionary power upon the facts to refuse it; in which case we should not be at liberty to review the order. *People ex rel. D. I. L. Co. vs. Jeroloman*, 139 N. Y., 14; *People ex rel. Slavin vs. Wendell*, 71 N. Y., p. 172."

State ex rel. Priddy et al vs. Gibson, 187 Mo., 536, 555:

"And among the things appealing to the discretion of the court are laches, and herein of mere delay not necessarily sufficient to involve the bar of statutes of limitation. . . .

"In *People ex rel. vs. Seneca Common Pleas*, 2 Wend., 264, one year was too long to wait to set aside certain proceedings. In *Vason vs. Gardner*, 70 Ga., 517, four months' delay in applying for a writ on a judge, *nisi*, to settle a bill of exceptions was held fatal to the remedy. In *estate of Depeaux vs. Peck*, 118 Cal., 522, six months were held too long to wait for an application to the Supreme Court to settle a bill of exceptions. . . . In another case a lying by for five months in a settlement of a bill of exceptions was held laches. *McConoughey vs. Torrence*, 124 Cal., 330.

"The New York, Ohio and Connecticut courts take a somewhat broader view and lay down certain general principles controlling the question of laches in mandamus. In *People ex rel. vs. Common Council*, 78 N. Y., 56, Chief Justice Church said: 'When the relator has for an unreasonable time slept upon his rights, the court may, in the exercise of a sound discretion, refuse the writ. In determining what will constitute such unreasonable delay, regard should be had to circumstances which justify the delay, *to the nature of the case*, and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay.'

"Chinn *v.* Trustees, 32 Ohio St., 336, was mandamus to compel the delivery of a township bounty bond for \$100 to a volunteer veteran of the civil war, and a delay of six years, nothing more appearing, was held not fatal.

"In Ansonia *v.* Studley, 67 Conn., 170, the lower court considered one year inequitable and as laches in an application for a mandamus to compel a trial judge to prepare a finding in a case with a view to appeal. The Supreme Court refused to interfere with such exercise of discretion on appeal from a judgment denying the writ.

"In this case application is made for mandamus to compel the settlement and signing of bills of exception over a year after the trial judge had refused to settle and sign them, and over a year after relators knew of his refusal, and we are of opinion the delay is ground for refusing a peremptory writ, unless the excuse offered is effective. Is it? We think not."

People ex rel. Connally *vs.* Board of Education, 114 App. Div., 1:

"I am of the opinion that the motion for a peremptory writ of mandamus should have been denied. A delay of nearly sixteen months—in the absence of any explanation—constitutes such laches on the part of the relator that he was not entitled to the relief sought, even though he would have had a legal right to be reinstated had he promptly made his application.

"In People ex rel. Young *vs.* Collis, 6 App. Div., 467, it was held, where an honorably discharged veteran claimed to have been improperly removed from his position, that he was guilty of laches inasmuch as he had allowed more than four months to elapse before applying for a mandamus to compel his reinstatement.

"In People ex rel. Croft *vs.* Keating, 49 App. Div., 123, it was held that the failure of a veteran to institute a mandamus proceeding until nine

months after his removal was fatal unless satisfactorily explained.

"The Collis case was cited with approval in *People ex rel. Miller vs. Sturgis*, 82 App. Div., 580, where an order directing the issuance of a peremptory writ of mandamus to restore the relator to a position in the fire department was reversed upon the ground that the relator was guilty of laches, he having waited for a year and five months before instituting the proceeding, and no excuse being presented for the delay.

"Here the return to the petition alleged that the relator's cause of action set out in his petition did not accrue within four months before the institution of the proceeding, and in addition alleged that he was guilty of laches in that he had neglected to begin his proceeding until a period of sixteen months had elapsed after his cause of action accrued and no facts were stated showing any reason for the delay.

"When the motion was made for a peremptory writ, the allegations of the answer, in so far as they denied the allegations of the petition, had to be taken as true as to all matters concerning which no finding had been made. *People ex rel. Corrigan vs. Mayor*, 149 N. Y., 215; *People ex rel. Croft vs. Keating*, *supra*."

Kenneally vs. City of Chicago, 220 Ill., 485, 502:

"It is clear that the appellant has been guilty of *laches* in not sooner presenting his application for restoration to the position, which he claims. 'The granting of the writ of *mandamus* is discretionary with the court in view of all the existing facts, and with due regard to the consequences which may result.' *People vs. Ketchum*, 72 Ill., 212; *People vs. Board of Supervisors of Adams County*, 185 *id.*, 288. In *People ex rel. vs. Board of Supervisors*, 185 Ill., 288, we said (p. 293): 'Courts, in granting or refusing writs of *mandamus*, exercise judicial discretion, and are governed by what seems necessary and proper to be done in the par-

ticular instance for the attainment of justice. Courts, in the exercise of wise, judicial discretion, may, in view of the consequences attendant upon the issuing of a writ of *mandamus*, refuse the writ though the petitioner has a clear legal right for which *mandamus* is an appropriate remedy.' It has been said that 'the writ is not granted as a matter of absolute right, and where it can be seen that it can not accomplish any good purpose, or that it will fail to have a beneficial effect, it will be denied' *Cristman vs. Peck*, 90 Ill., 150; *People vs. Lieb*, 85 id., 484; *Illinois Watch Case Co. vs. Pearson*, 140 id., 423. It has also been held that the writ of *mandamus*, being a discretionary writ, will only issue in a case where it appears by law that it ought to issue, and the court will not order it in doubtful cases. *Commissioners of Highways vs. People*, 4 Ill. App., 391. In *People ex rel. vs. Davis*, 93 Ill., 133, we said: 'The court exercises a discretion in granting or refusing the writ, and if the right be doubtful, it will be refused.' It has been held that the writ will be refused where the granting of it will disarrange the public service. *People ex rel. vs. Palmer*, 38 N. Y. Supp., 652. In *People ex rel. vs. Collis*, 39 N. Y. Supp., 698, it was said: 'Without considering or determining the other questions raised upon this appeal, it seems to us the order appealed from should not have been made by reason of the delay and *laches* on the part of the relator in demanding reinstatement in the office, from which he had been discharged, and in applying for a *mandamus* to compel such reinstatement.' "

George Creek Coal & Iron Co. vs. County Commissioners, 59 Md., 255:

The court held that where taxes had been paid under a mistake of fact, the party receiving them is bound to refund, and after an action of *assumpsit* a *mandamus* would be the proper remedy to compel the county commissioners to levy a tax for this payment.

In this case, however, the relator delayed three years in making application for mandamus since the last payment of taxes. The court said (p. 262):

"But we are of opinion that the reason and policy of the statute (of limitations) should be considered, and be allowed application by way of analogy, in determining the question as to the right of the applicant to obtain the benefit of the writ of mandamus, in cases circumstanced like the one before us. The authorities would seem to be quite conclusive in support of that proposition."

In *Treat vs. McGaughey*, 85 Tex., 478, 487, the court said:

"It is sufficient reason for refusing the writ here applied for, that the plaintiffs have slept so long on their rights that the facts have become obscured, and that so far as this court can see the determination of the litigation would most probably require the decision of doubtful questions of facts. Upon this ground alone we deem it proper to dismiss the case without passing upon any other question presented."

Wallcott vs. Mayor, 51 Mich., 249:

In denying a writ of mandamus to enforce payment of a claim for salary where the relator first elected to sue in assumpsit but left the action undetermined, and, after ten years had passed from the date of his claim, sought his remedy by mandamus from the appellate court, the court said:

"As respects his remedy, the demands have become stale and public policy is against extending it to such cases."

Clark vs. Treasurer of Jersey City, 42 N. J. L., 94:

A writ of mandamus was refused where there had been a delay of six years in presenting warrant to city treasurer for payment. The warrants required the approval of the mayor before they could be presented for payment. Six years after

the date of the warrants the approval of mayor, given in his absence by president board of aldermen after being twice refused by former mayors, was obtained. The writ of mandamus was asked to compel payment by the city treasurer. The court said: "The writ of mandamus can not be claimed by the relator as his right. The court in its discretion will refuse it if circumstances appear which render the justice or propriety of its allowance doubtful. One of the grounds on which the courts deny its use in the collection of debts is where he who seeks its aid is chargeable with unreasonable delay in asserting his claim."

State vs. Kirby, 17 S. Car., 563:

"The rule, however, is, that where there is unreasonable delay the court will, in the exercise of its discretion, refuse to issue the writ. *Moses Mand*, 190; 1 Redf. Ry., 658, and cases there cited. See, also, *King vs. Stainforth*, 1 M. & S., 32; *People ex rel. Phelps vs. Del. Comm. Pleas*, 2 Wend., 259; *People vs. Seneca Comm. Pleas*, 2 Wend., 264; and the authorities collected in a note in 2 Johns Cas., 217. In this case the relator delayed about ten years since his claims were allowed, and for about seven years since they were refused payment; and in his petition he suggests no reason for such delay. . . .

"We are unable to discover any sufficient reason, or, indeed, *any* reason at all, for this extraordinary laches on the part of the relator, and therefore, in the exercise of that discretion to which such an application appeals, we feel bound to refuse the writ prayed for."

State vs. Appleby, 25 S. Car., 105:

"In this case application for the writ of mandamus was not made until September, 1884, nearly nine years after the old board of commissioners endorsed the order of the relator, eight years after the last payment thereon, and more than six years after its rejection by the

commission, and formal notice of refusal to pay. Under these circumstances the respondents insist that 'eight years having elapsed since the claim was declared invalid and not a part of the bona fide indebtedness of Colleton County, the relator has lost his right to the writ by his laches.' The relator insists that there has been no laches on his part as shown by the fact that he has not slept over his rights; but during the whole period indicated continued to demand payment of his claim. . . .

"In this respect we are unable to distinguish this case from that of the State *vs.* Kirby, 17 S. C., 564, where the court said: 'We are unable to discover any sufficient, or, indeed, any reason at all, for this extraordinary laches on the part of the relator, and therefore in the exercise of that discretion to which such an application appeals, we feel bound to refuse the writ prayed for.' "

Manchester vs. Furnald, 71 N. H., 153:

A petition for mandamus to correct error in valuation of taxable property by assessors was denied, on the ground that the proceeding was not seasonably brought *nine months* after the appraisement of the property. The court said:

"Any unnecessary or unexplained delay in bringing the petition, in view of the character of the proceeding and the relief asked, would be fatal to its maintenance."

State ex rel. Beach vs. Dist. Ct., 29 Mont., 265:

"The purpose of the writ (mandamus) is so apparent that any unreasonable delay defeats its object." (Delay six years.)

Chinn vs. Trustees, 32 Ohio, 236:

There is no statute of limitations in Ohio applied to mandamus. The court in defining an application under "payment of bounties to veteran volunteer" made under

act of 1867 in year 1873 (six years and more) for mandamus to compel defendants to deliver \$100 bond to relator, said:

"Where relator has slept upon his rights for an unreasonable length of time, especially if the delay be prejudicial to the defendant, or to the rights of other persons, the court, in the exercise of a sound discretion, may refuse the writ."

Avery vs. Township Board, 73 Mich., 622:

The court held a delay of more than six years to demand payment of township and highway orders, or to apply for mandamus to compel such payment, if unexplained, will bar such relief.

Hill vs. Fitzgerald, 79 N. E., 825 (Mass):

"The granting of the writ being discretionary, the remedy is barred if the petitioner unreasonably neglected to enforce his right. *Hill vs. County Comm'r*, 4 Gray, 414; *Waldren vs. Lee*, 5 Pick., 323; *Murray vs. Stevens*, 110 Mass., 95; *J. H. Wentworth Co. vs. French*, 176 Mass., 442; *Streeter vs. Worcester*, 177 Mass., 29."

To the same effect are the following cases:

True vs. Malvern, 43 N. H., 503 (delay one year).

Eggelston vs. Kent, 50 Mich., 147 (delay two years).

Taylor vs. Board, 57 N. Y. L., 376.

State vs. Board, 107 La., 162.

Cross vs. Cross, 90 N. Car., 15.

State vs. Supreme Court, 15 Wash., 314.

People vs. Seneca, 2 Wend., 264.

V.

The Court Has No Jurisdiction to Grant the Relief Prayed.

In determining the right of the appellant to the relief sought, it is well to bear in mind that pensions are bounties of the Government which Congress has the right to

give, withhold or recall in its discretion. No pensioner has a vested legal right to his pension.

U. S. *vs.* Teller, 107 U. S., 64, 69:

“No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government which Congress has the right to give, withhold, distribute, or recall at its discretion. Walton *vs.* Colton, 19 Howard, 355.”

Frisbie *vs.* U. S., 157 U. S., 166:

“The pension granted by the Government is a matter of bounty. ‘No pensioner has a vested legal right to his pension. Pensions are bounties of the Government which Congress has the right to give, withhold, distribute or recall at its discretion. Walton *vs.* Colton, 19 How., 355.’ U. S. *vs.* Teller, 107 U. S., 64, 68. . . . No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of Congressional power. U. S. *vs.* Hall, 98 U. S., 343.”

A.

The Action of the Former Commissioner of Pensions Can Not be Reviewed by Mandamus.

Whatever may be the form of the present petition for a mandamus, its ultimate object is to compel the present Commissioner of Pensions to revoke the order of February 9, 1881, of the former Commissioner, and restore the name of Jerry Gordon to the list of pensioners, and to pay to the appellant the so-called accrued pension, from the date of the suspension to the date of Gordon's

death, which occurred on June 29, 1885. In other words, the court is asked to substitute its judgment in the place of that of the Commissioner of Pensions, and to say that he erred in issuing the order of 1881, suspending the pension "upon satisfactory evidence that fraud was perpetrated in obtaining such special act."

If the act of February 9, 1881, of the former Commissioner of Pensions suspending the payment of the pension to Jerry Gordon was wrongful, it can not be made good by mandamus against the present Commissioner of Pensions.

In the case of *U. S. ex rel. Sousa vs. Warner*, Commissioner of Pensions, 36 W. L. R., 204, it was held that the act of the former Commissioner of Pensions in suspending an allowance made to a member of the Marine Corps, upon his being granted a pension under the general laws, that there was no specific authority justifying the present Commissioner of Pensions in making good the wrongful act of his predecessor, and the mandamus to compel such act was denied.

The court said:

"In so much, however, as no specific authority can be pointed out which authorizes or justifies the present Commissioner of Pensions to make good any wrongful act of his predecessor in withholding these funds from the said Antonio Sousa in his lifetime, I must decline to issue the writ of mandamus as prayed."

In the case of *U. S. ex rel. Warden vs. Chandler*, 2 Mackay, 527, the court held that the question whether an executive officer shall revise the action of his predecessor is one addressed to his discretion and can not be interfered with by this court by mandamus.

B.

The Court Can Not Review the Act of the Commissioner of Pensions Suspending Payment, as It Involved the Exercise of His Judgment and Discretion.

It has been so repeatedly held by this court and by the Supreme Court of the United States, as not to require the citation of authority, that a mandamus or injunction will not issue against an executive officer of the Government in regard to the performance of a duty by him involving the exercise of judgment and discretion. The only question which the court will pass upon is that of determining whether the act sought to be enforced or prohibited is one involving judgment or discretion, or is a mere ministerial duty. If it be the former the relief will be denied.

In the case under consideration, section 4720 of the Revised Statutes of the United States provides that:

“The Commissioner of Pensions shall, on satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereon until the propriety of repealing the same can be considered by Congress.”

The language of this section is plain, that the Commissioner of Pensions shall use his judgment and discretion to determine whether there is satisfactory evidence that fraud was perpetrated in obtaining the special pension act, and when he so determines it is his absolute duty to suspend payment until Congress shall consider the case.

The whole matter of determining whether a pension should be suspended is vested in the Commissioner of Pensions, not in the court, and the court can not review the findings of the Commissioner.

In *U. S. vs. Black*, 128 U. S., 40, the court held that

the Commissioner of Pensions, in considering an application for increase of pension and evidence in support of it, and by deciding adversely to the petitioner, performs an executive act which the law requires him to perform in such case, and the courts have no appellate power over him in this respect and no right to review his decision. In delivering the opinion, the court said:

"The court will not interfere by mandamus with executive officers of the Government in the exercise of their ordinary official duties, even where these duties require an interpretation of the law, the court having no appellate power for this purpose. . . . The Commissioner of Pensions did not refuse to act or decide; he did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was affirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration we should be of the same opinion or of a different opinion is of no importance in the decision of this case. We have no appellate power over the Commissioner and no right to review his decision. The decision and his action thereon were made and done in the exercise of his official duties, and they were by no means ministerial acts."

In the case of *U. S. vs. Raum*, 18 D. C. App., 556, it was held that the Commissioner of Pensions is invested with a judicial discretion in the interpretation of the law as to the amounts due a pensioner for a given disability, and the court can not interfere by mandamus.

In the case of *Daly vs. U. S.*, 17 Court of Claims, 144, 148, the court said:

"Without laboring through the pension laws to show the fact, nothing can be clearer or better known to everybody having an ordinary knowledge of those laws than that the matter of ascertaining and determining and certifying who is

lawfully entitled to the gratuity authorized to be bestowed on account of military service is confined to certain executive officers and nowhere to the judiciary. No right to a pension is fixed until those officers declare it so, and when they decide against the right there is no appeal from that decision except to Congress."

In the case of *Bowen vs. U. S.*, 14 Court of Claims, 162, 100 U. S., 508, the court said:

"The construction given to pension laws by the Commissioner of Pensions is entitled to great consideration."

In the case of *Harrison vs. U. S.*, 20 Court of Claims, 122, where the Secretary of the Interior, on *ex parte* reports of special agents of the Pension Bureau charging the complainant with misrepresentation and fraud in obtaining his certificate, ordered that he be dropped from the pension roll, it was held that the provision of the Revised Statutes, section 4739, which authorizes the Secretary of the Interior to strike from the pension roll "the name of any person" whenever it appears "that such name was put upon such roll through false or fraudulent representations," *includes all pensions*, and that the power of revision of the pension roll is inherent in the necessities of the Pension Bureau and the nature of its decisions. The court said:

"A pension is a gratuity. It involves no claim of right. . . . The practice of the Department to drop from the roll the names that have been placed there by misrepresentation and fraud is of long duration. Even if the Secretary's construction of the statute were doubtful, we should not feel called upon under the former rulings of this court and the Supreme Court to overthrow a practice long continued, apparently necessary for the honest administration of the pension laws,

well known to Congress, and supported, at least indirectly, by many provisions of the law above cited."

The pension was suspended by the Commissioner on February 9, 1881, and the papers referred to Congress with his recommendation on that date. From then until the present time it has not been within the power of the Commissioner of Pensions or of the Secretary of the Interior to set aside such action suspending the pension, it being by the express terms of the law absolutely and solely within the power of Congress to determine whether the suspension shall stand or shall be cancelled. Until Congress acts, and unless Congress shall remove such suspension, no payment, as is sought for in these proceedings, can be made under the special act.

The Supreme Court in the case of *Boulton vs. Blaine*, 139 U. S., 306, 329, said:

"The inaction of Congress is not equivalent to a direction by Congress. The political department has not parted with its power over the matter and the intervention of the judicial department can not be invoked."

It is submitted that until Congress has acted, there is no power in the Commissioner of Pensions, in the Department of the Interior, or in the courts, to remove the suspension, as that power is solely vested in Congress, and no court has the right to interfere with the legislative branch of the Government.

C.

The Appellant is not Entitled to an Accrued Pension.

It is claimed in the petition that immediately upon the death of Jerry Gordon the right to the accrued pension was vested in the appellant by operation of law, then

and now in force,—section 4718 of the Revised Statutes of the United States, and the act of Congress approved March 2, 1895. Section 4718 is now superseded by the act of March 2, 1895. Copies of the acts referred to will be found in the appendix to this brief.

The pleadings show that the payment of the pension was suspended February 9, 1881, and the matter then referred to Congress; that Jerry Gordon died on June 29, 1885. Paragraph 9 of the amended answer (Rec., p. 16) denies that immediately upon the death of Gordon the appellant became entitled to accrued pension, and states that Gordon died before the approval of the act of March 2, 1895, and did not at any time file an application for restoration of pension, and was not on the date of his death either a pensioner or a person entitled to pension having an application pending, within the purview of section 4718 of the Revised Statutes of the United States, or of the said act of March 2, 1895.

It is uncontroverted that the payment of Gordon's pension was suspended upon the date of his death, and at that date there was no application for a pension pending. By repeated decisions of the Attorney-General, the Pension Office, and the Comptroller of the Treasury for Department of the Interior, it has been determined that in order to entitle a widow to the "accrued pension" there must have been an application pending for pension at the date of the pensioner's death.

Section 4718 of the Revised Statutes uses the words "having an application pending." The act of March 2, 1895, uses the term "accrued pension." In construing this act, in 19 Opinions Attorney-General, 1, it was held:

"The phrase 'accrued pensions' as used in this section means the amount of money unpaid by the Government to which the pensioner or one who has a valid pending claim for pension would be entitled at the time of his death."

In 19 Opinions Attorney-General, 359, in construing the act of March 2, 1895, it was held that the payment of the accrued pension due on a pension certificate at the time of death is to be considered as applicable to all outstanding pension certificates, whether issued before or after the passage of such act, but the pensioner must have died since the passage of that act to entitle his legal representative to claim such accrued pension.

See, also, 16 Opinions Attorney-General, 639.

In the case of *U. S. ex rel. Sousa vs. Warner*, 36 Washington Law Reporter, 204, the court said:

"The relator is not entitled to have the money paid her either in the capacity of widow or executrix of her deceased husband, because at no time during his life did her husband complain of the suspension of said allowance, and there was no claim pending for the same when he died; that the said allowance is in no sense pension money and can not be paid under the act of March 2, 1895 (28th Statutes at Large, 964), which is the only existing law regulating the payment of accrued pensions."

In *re Henry Groppe*, 8 Pension Decisions, 293, it was held when a claim for pension was rejected prior to the soldier's death, his widow is not entitled under the act of March 2, 1895, which is the only law now in force relating to payment of accrued pensions, to re-open and prosecute such rejected invalid claim.

In *Mary Ulrich's Case*, 9 Pension Decisions, Old Series, 354, Secretary Teller held if a soldier died without having filed an application for a pension, there is no accrued pension from discharge to death.

In *re Woolhart*, 8 P. D., 226, where a soldier's claim stands rejected at the time of the death, it was not to be

considered as pending within the meaning of section 4718 of the Revised Statutes, or of the act of March 2, 1895.

Three Decisions Comptroller for Interior Department, 562, it was held: Accrued pension under the act of March 2, 1895, must be pension money not only due but payable to the pensioner himself had he lived.

Three Decisions Comptroller for Interior Department, 380: It was held, until a name once stricken from the list of pensioners has been properly restored, there can be no accrued pension.

It will thus be seen that the two departments of the Government charged by law with the adjudication of claims arising out of accrued pensions due at the date of the death of a beneficiary under the pension laws, have reached identically the same conclusion as to the intent and meaning of section 4718 of the Revised Statutes and of the act of March 2, 1895, namely: that there must have been an application pending on the date of the soldier's death to entitle his widow to a claim for accrued pension. As Gordon never filed an application for restoration of pension, he left no claim pending when he died, and the appellant as his widow has therefore no status to come in and claim accrued pension which might have been due to Gordon.

In the construction of a doubtful and ambiguous law, contemporaneous construction of those who are called upon to act under the law or are appointed to carry its provisions into effect is entitled to great respect. The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons.

U. S. vs. McDaniel, 7 Peters, 14.

U. S. vs. Alabama, G. S. R. R. Co., 142 U. S., 615, 621.

Johnson vs. Towsley, 13 Wallace, 72.

Brown, administratrix, vs. U. S., 113 U. S., 568.

In the case of *Edwards vs. Root*, 22 App. D. C., 419, Mr. Justice Alvey said:

"It is declared by the Supreme Court of the United States, in *U. S. vs. Moor*, 95 U. S., 760, that 'a construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not be overruled without cogent reasons.' *Edwards vs. Darby*, 12 Wheaton, 210; *U. S. vs. State Bank*, 6 Peters, 29; *U. S. vs. McDaniel*, 7 Peters, 14."

As has been shown, the act itself allows the widow to claim an accrued pension only where the soldier had an application pending at the time of his death. The case under consideration does not fall within the provisions of the statute. Two of the departments having the duty of carrying out the law have adjudged the statute to mean that the soldier must have had a bona fide application for pension pending at the time of death to entitle his widow to the benefit of the accrued pension, and their decision is entitled to the utmost respect by the courts in considering the act; these decisions have even been held to have the force of common law, which must be respected by the judicial branch.

It is therefore submitted that upon the merits of the case itself the appellant is entitled to no relief.

Conclusion.

The contention of the appellee may be summarized as follows:

1. That the paper filed termed a traverse was properly stricken out, leaving all the allegations properly pleaded in the amended answer admitted by demurrer thereto.
2. The order of June 25th, vacating the order of June 4th, and giving leave to amend the answer was proper, in that the court had full control over its judgments

during the term, and the appellant made no objection in the court below. If any defect there was in the order of June 25th, appellant by pleading over, without objection, waived the defect.

3. The special act granting pension to Jerry Gordon was procured by fraud which is a complete bar to the relief sought. The law is well settled that a petitioner in a mandamus case must come into court with clean hands, and when it is shown that he himself is guilty of fraud in the procurement of the act sought to be enforced he has no standing in court. Mandamus is a proper remedy to enforce a legal right, and not to perpetrate or perpetuate a fraud.

4. Mandamus is a civil action in the District of Columbia, and is barred in three years after the right thereto has accrued.

5. The appellant has been guilty of gross laches in slumbering on her rights, and, as the appellee has been greatly prejudiced thereby, the writ of mandamus should be denied.

6. The appellant is not entitled to an accrued pension under section 4718, nor under the act of March 2, 1895, as Gordon had no claim pending for pension at the time of his death in 1885.

7. After the case was transmitted to Congress by the Commissioner of Pensions in 1881 the Commissioner of Pensions was powerless to act in the matter, and Congress alone had jurisdiction of the case. The inaction of Congress is not equivalent to a direction by Congress, and the situation has in no wise been altered by the failure of Congress to act.

8. The suspension of the pension under section 4720, of the Revised Statutes, upon satisfactory evidence to the Commissioner of Pensions that fraud was perpetrated in obtaining the special act, was done in the exercise of

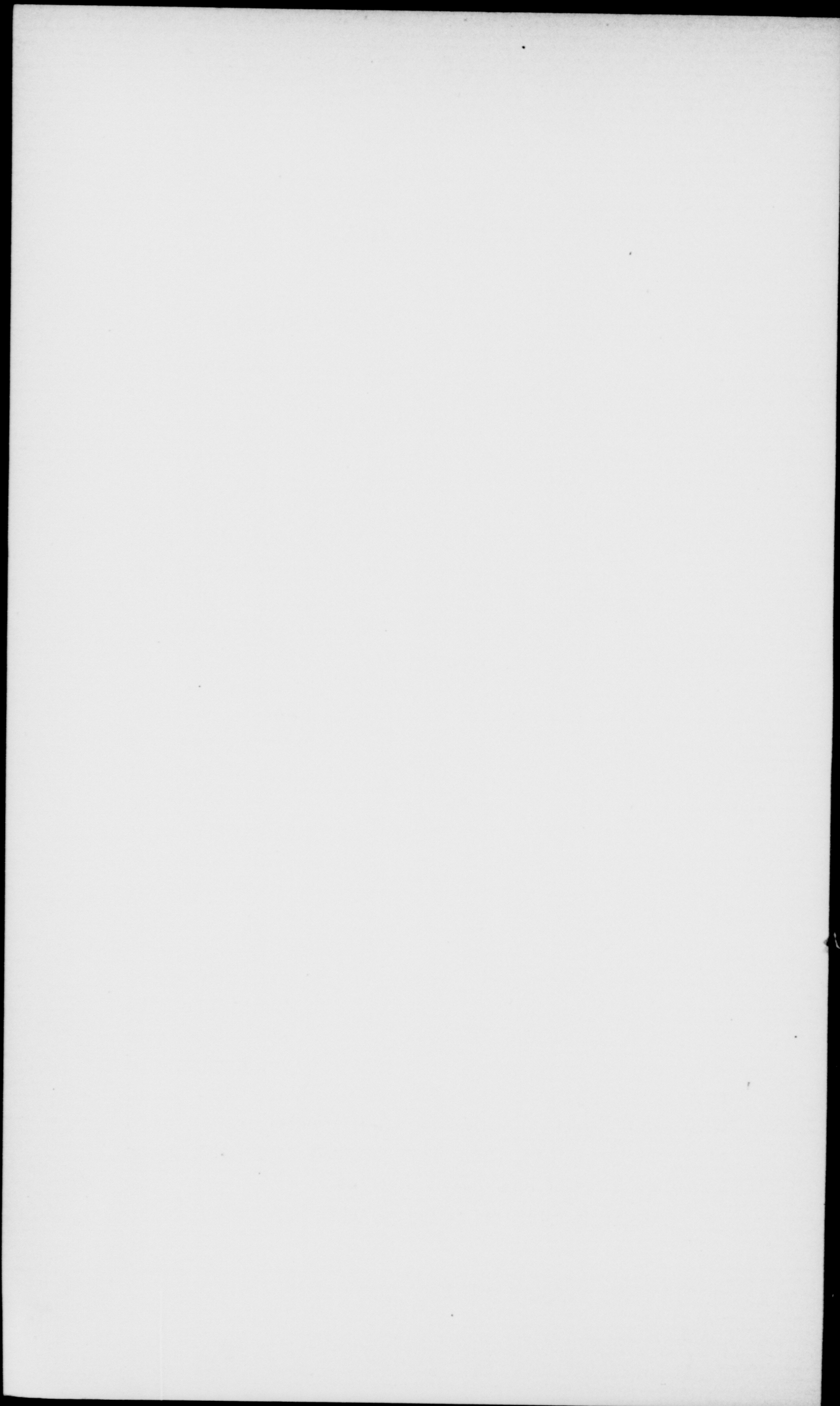
the judgment and discretion of the Commissioner, and can not be reviewed by the court by mandamus.

9. If the act of the former Commissioner of Pensions in suspending the pension was wrongful, the court has no power to review such action.

Respectfully submitted.

DANIEL W. BAKER,
Attorney of the United States
in and for the District of Columbia.

REGINALD S. HUIDEKOPER,
F. SPRIGG PERRY,
Assistant Attorneys of the United States
in and for the District of Columbia.



APPENDIX.

Revised Statutes of the United States.

Sec. 4718. If any pensioner has died or shall hereafter die; or if any person entitled to a pension, having an application therefor pending, has died or shall hereafter die, his widow, or if there is no widow, the child or children of such person under the age of sixteen years, shall be entitled to receive the accrued pension to the date of the death of such person. Such accrued pension shall not be considered as a part of the assets of the estate of deceased, nor liable to be applied to the payment of the debts of said estate in any case whatever, but shall inure to the sole and exclusive benefit of the widow or children; and if no widow or child survive, no payment whatsoever of the accrued pension shall be made or allowed, except so much as may be necessary to reimburse the person who bore the expenses of the last sickness and burial of the decedent, in cases where he did not leave sufficient assets to meet such expenses.

Sec. 4720. When the rate, commencement, and duration of a pension allowed by special act are fixed by such act, they shall not be subject to be varied by the provisions and limitations of the general pension laws, but when not thus fixed the rate and continuance of the pension shall be subject to variation in accordance with the general laws, and its commencement shall date from the passage of the special act, and the Commissioner of Pensions shall, upon satisfactory evidence that fraud was perpetrated in obtaining such special act, suspend payment thereupon until the propriety of repealing the same can be considered by Congress.

28 U. S. Statutes at Large, 964.

Chap. 193. An act to provide for the payment of accrued pensions in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the twenty-eighth day of September, eighteen hundred and ninety-two, the accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in the case of a person pensioned, or applying for pension, on account of his disabilities, or service, be paid, first, to his widow; second, if there is no widow, to his child or children under the age of sixteen years at his death; third, in case of a widow, to her minor children under the age of sixteen years at her death. Such accrued pension shall not be considered a part of the assets of the estate of such deceased person, nor be liable for the payments of the debts of said estate in any case whatsoever, but shall inure to the sole and exclusive benefit of the widow or children. And if no widow or child survive such pensioner, and in the case of his last surviving child who was such minor at his death, and in case of a dependent mother, father, sister, or brother, no payment whatsoever of their accrued pension shall be made or allowed except so much as may be necessary to reimburse the person who bore the expense of their last sickness and burial, if they did not leave sufficient assets to meet such expense. And the mailing of a pension check, drawn by a pension agent in payment of a pension due, to the address of a pensioner, shall constitute payment in the event of the death of a pensioner subsequent to the execution of the voucher therefor. And all prior laws relating to the payment of accrued pension are hereby repealed.

Approved, March 2, 1895.

